SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 362

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, PETITIONER

vs.

WARNER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

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In United States District Court
Eastern District of Pennsylvania

Docket entries.

May 20, 1941—Complaint filed.
May 20, 1941—Summons (2) handed to counsel for acceptance of service.
May 21, 1941—Summons as to Nicholas Rusin returned: "service accepted" and filed.
June 4, 1941—Summons as to A. P. Norton returned: "On May 23, 1941 Served" and filed.
June 5, 1941—Appearance of Maurice S. Levy, Esq. for Nicholas Rusin filed.
June 9, 1941—Answer of Nicholas Rusin filed.
June 10, 1941—Transcript of testimony before Commissioner filed (2 vols.).
July 9, 1941—Hearing sur Bill and Answer.
July 9, 1941—Order of court remanding case to Deputy Commissioner for further proceedings and report.
July 15, 1941—Motion to Dismiss complaint filed.
Aug. 4, 1941—Motion by A. P. Norton to vacate order remanding case filed.
Oct. 24, 1941—Hearing sur motion to vacate order of July 9, 1941. Eo die: Motion denied.
Mar. 24, 1942—Report of Deputy Commissioner pursuant to order entered July 9, 1941.
May 8, 1942—Order to place case on Argument List filed.
2 May 19, 1942—Further hearing. CAV.
June 4, 1942—Testimony filed (1 vol.).
July 23, 1942—Opinion, Kalodner J. granting motion to dismiss filed.
July 23, 1942—Judgment dismissing action filed. 7/24/42 Noted and notice mailed.
July 31, 1942—Defendant's bill of costs filed.
Aug. 26, 1942—Plaintiff's Notice of Appeal filed. Copy to M. S. Levy Esq. & G. A. Gleeson, Esq.
Aug. 26, 1942—Supersedeas bond in $4,000, with Seaboard Surety Co., surety, and order of court approving bond filed.
Sept. 11, 1942—Release of Lien of Judgment filed.
Oct. 5, 1942—Stipulation of counsel that only one copy of record be filed with Clerk of U. S. Circuit Court of Appeals, filed.
Oct. 5, 1942—Appellant's designation of contents of record on appeal filed.

3 In United States District Court

Testimony

Bertram M. Thomas testified that he had been the Marine Superintendent of the Warner Company for 39 years, and that his duties in this position were to direct the operation of the tugboats, lighters, and barges, their loading and discharging, etc., in the port of Philadelphia, Delaware River and tributaries and vicinity.

Bertram M. Thomas, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * *

(R. pp. 136 to 138)

Q. On Page 3 (Nov. 15, 1941, direct examination of Nicholas Rusin) of the transcript of this testimony occurs:

"Q. What was your job with the Warner Company?

A. Boatman.

Q. What were your duties as boatman?

A. To make fast the boat, to pull the boat ahead and make it fast.

Q. What kind of boat or boats were you working on?

A. They was wooden boats, a little over 100 feet long.

Q. Where was this lighter in the habit of going, from what place to what place?

A. Go from all over in vicinity, to Wilmington, Chester, all over uptown, 30 miles up, Camden.

Q. All of the places where they went were in the Delaware River?

A. We go to Wilmington, that is as far as we go; the rest is Chester, Camden, New Jersey, Cooper's Creek, Riverside, Morrisville, 30 miles away from here."

4 On page 4 there is this testimony:

"A. On my boat I got $80.00 a month, but on another boat, where there is no man, I am working on this boat for 30¢ an hour.

Q. Did you sleep on your boat?

A. Yes."

On page 7, the testimony of Mr. Rusin recites:

"A. There was no one there at the time I got injured, but before then I had a man helping me with the ropes or lines.

Q. How many are usually on the boat?

A. One man."

And the further answer, on page 6:

"A. I had to heave the capstan to the shore. I heaved the line, and the boat was about 12 feet from the shore, and I had to throw the line from the capstan on the boat to the shore. I had to turn the capstan bar to bring the boat into shore, one side of the boat was fast to shore."

Captain, are those accurate statements, to your knowledge?

A. I would say that is the duty of the man. I don't know what his statements were, but that is the duty of the man. I mean, all of them were in this work.

* * * * * *

(R. p. 139)

A. $80.00 a month was the month's pay for taking care of his own boat. For work he did on other boats, he received 30¢ an hour for.

Q. Is this rate of pay under union agreement?

A. It was made a union agreement in July '37. At that time we were unionized, and the union together with the dele-
5 gates representing the union and the secretary of that union and the Warner Company entered into an agreement, and the workmen accepted it at that time.

* * * * *

(R. p. 144)

Q. Do you know when Mr. Rusin commenced his employment with the Warner Company?

A. 5th month, 6, 1936.

Q. Did you engage him after personal interview?

A. I did.

Q. Did he tell you, and do you remember what he told you, with respect to his capacity?

A. He told me that he was an experienced seaman and worked at that work a good part of his life.

Q. Do you have there any record of the Warner Company of voyages on which Mr. Rusin was aboard a barge?

A. I do.

* * * * *

(R. pp. 153 to 157)

Q. What does the bargeman do?

A. He attended to his own boat. Some of the boats do not have men on.

Q. What do you mean by attending the boat?

A. I mean that he kept it safe, kept it pumped out.

Q. I am talking about the bargeman who lives aboard the barge.

A. That is right.

Q. Is there anything else done further by the bargeman?

A. He keeps it safe, so far as the water is concerned, he keeps it properly tied up.

Q. What do you mean, properly tied up?

A. Well, the rise and fall of the tide, if he had it too close to the wharf, might hang up on the wharf, if the tide went down, and the lines got too tight. He requisitions lines for the boat, keeps it equipped with lines. I am giving a general idea of his duties.

Q. Go ahead, in your own way.

6 A. Reports any leaks, anything that is necessary to keep the boat in a safe condition.

Q. Are there provisions aboard Barge 59 for taking of soundings?

A. Yes.

Q. Barge 59 was Mr. Rusin's barge?

A. Yes.

Q. Do you know whether he did take soundings, or not?

A. I know he kept it free of water in most cases. He must have taken soundings.

Q. When the barge was taken in tow, what would Mr. Rusin's duties be?

A. He would take the lines from the tugboat; he would attach lines to other boats in the fleet that did not have captains on; he would respond to the whistles of the tugboat when it called for men to come up and slack the lines, adjust the lines.

Q. Where would he get his orders from?

A. His orders would come from my office, until he was in tow of the tugboat. Then the tugboat would take him in charge to deliver to where they want it taken.

Q. So far as the navigation part was concerned, who would be in charge?

A. He would be in charge. He would put the lights out; he would attend the lines, and see that the boat was properly tied up when delivering.

Q. He would do what about operating the navigation lights?

A. He was carrying lights for that purpose.

Q. What lights does the barge carry?

A. Two lights—two white lights.

Q. Did he have any duties to move the barge in the absence of a tug, on occasion?

A. He might.

A. He did have occasion to, frequently.

Q. You know that of your own knowledge?

7 A. Absolutely.

Q. Do I understand right that sometimes the Warner Company tow barges in flotilla formation, that is, more than one barge at a time?

A. Usually.

Q. Usually?

A. Usually do.

Q. When that occurs, how many bargemen will you have in the flotilla?

A. Well, that varies; but we try to have at least two, or maybe more, depending upon circumstances.

Q. There may be more barges than the number of bargemen?

A. That is true; that is usually the case.

Q. The bargemen would have charge of the flotilla and its care?

A. Yes.

Q. Was Mr. Rusin ever required to do any shoveling of cargo?

A. No.

Q. Did he have any duties in connection with handling of cargo?

A. No, none whatever.

Q. Did he have any duties off of his boat?

A. Well, on other boats in the fleet.

Q. But his duties were always connected with the boat itself?

A. Always the same kind of work that he did on his own boat.

Q. Those boats were on navigable waters?

A. That is right.

By the DEPUTY COMMISSIONER:

Q. I do not know that it is important, but will you tell me, Captain, in case of some emergency, where there would be a conflict of opinion as to the handling of lines as this flotilla is in

8 motion, would the tugboat captain have the final say as to what should be done, or would that be up to Mr. Rusin?

A. I believe he would. I think the operation is always in charge of the tugboat, taking the lines off the boat and adjusting them as he wants them. I would give the captain of the tugboat authority to demand that the bargeman do what he demands to be done.

Cross-Examination

(R. p. 162)

By Mr. Fortenbaugh:

Q. What does he have to do with navigating it between Philadelphia and Wilmington?

A: He would have to adjust his lines to tow properly. He would have to put out tow lights.

(R. p. 163)

By Mr. Levy:

Q. All he has to do is to see that his lines, or the lines from the tugboat, are connected to his barge; is that correct?

A. That is not all. No, he has to see that the lines from his boat to the next boat are properly adjusted.

Q. All right. And if darkness falls he has to put up two lights on each barge; is that correct?

A. That is right.

Q. That is the extent of his duties in moving the barge from one point to another; isn't that so?

A. And watching to see that it is free of water, to notify the tugboat if it is in trouble.

9 In United States District Court

Opinion

Sur Motion to Dismiss Complaint

Kalodner, D. J.

The issue here is as to whether one Nicholas Rusin, a bargeman employed by the plaintiff, Warner Company, was "a master or member of a crew" within the meaning of the Federal Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. A. 901 et seq.

The pertinent provisions of the Act are as follows:

"Sec. 903.

"(a) Compensation shall be payable under this chapter in respect of disability or death of an employee * * *. No compensation shall be payable in respect of the disability or death of—(1) a master or member of a crew of any vessel * * *."

"Sec. 905.

"The liability of an employer prescribed in section 904 of this chapter shall be exclusive and in place of all other liability of such employer to the employee * * *."

Section 902—"Definition"—provides:

"(3) The term 'employee' does not include a master or member of a crew of any vessel * * *."

The Warner Company by Bill of Complaint has appealed from the award made by Augustus P. Norton, Deputy Commissioner for the Third Compensation District, to Rusin, as a result of injuries which Rusin suffered following a fall on board the Warner Company Barge No. 59, while he was engaged in turning the capstan on the barge to draw the vessel by its mooring line to its berth at a Philadelphia pier.

The Warner Company contends that Rusin came within the category of "a master or member of a crew" and was thus not entitled to any award under the provisions of the Longshoremen's Act.

The Complaint, and the motion to Dismiss the Complaint, agree that the single question before the court is that of the jurisdiction under the Longshoremen's Act.

The facts as summarized in the original findings of the Commissioner are as follows:

"On March 11, 1938 said claimant while performing services for the employer upon the navigable waters of the United States, sustained personal injury resulting in his disability while he was employed as a boatman on Barge No. 59, then afloat on the waters of the Schuylkill River near Christian Street in said Philadelphia;

"That his duties consisted of general care of the barge or lighter to which he was at any time assigned, including making lines fast and unfast at docks and tightening or slackening them as necessary; that he had no other duty in connection with the operation of said vessels; that the vessel on which he was injured had no motive power of its own; that it was propelled either by towing or, for shorter distances, by winding up a cable by means of a capstan operated by hand; that the movements of the barge were confined to waters in the Schuylkill and Delaware Rivers within about 30 miles of the plant of the employer in Philadelphia; that he was the only person employed aboard the barge at the time of his injury;

"That on said date claimant was engaged in moving to a pier by means of a hand capstan the barge on which he was employed; that he succeeded in propelling it the greater part of the required distance against some difficulties of wind and tide, in addition to the weight of the boat; that the capstan bar then pulled out striking him in the chest."

The itinerary of Rusin's barge at various times covered ports of call in Pennsylvania, New Jersey and Delaware;
11 the Delaware, Schuylkill, Christiana, Cooper and Rancocas Rivers; and included trips sixty miles in length, which sometimes took fifteen days between loading and discharging, although the barge was not actually under way except for a fraction of the time—i. e. for periods of fifteen or sixteen hours. The barge never went to sea. Rusin was continuously aboard. He lived, ate and slept on the barge, and bought his own meals. He was paid $80 a month. When he worked on any other boat he would get an additional 30¢ per hour.

Rusin worked under a Union Contract between the Harbor Boatmen's Union and the Warner Company wherein it was provided:

"SECTION 6: All Bargemen assigned to specific barges in active operation shall be paid a monthly salary of $80.00 and shall be provided with quarters. This compensation is for all work performed by Bargemen in the operation of his own vessel.

"SECTION 7: The rates as provided herein are based upon all services and time required to safeguard and operate the barge fleet, including necessary pumping, watching, or other emergency duties on Sundays and holidays."

Rusin's duties were limited to his own barge and its safekeeping. Amplifying the Commissioner's findings as quoted above, it may be said that he had the duty of changing the mooring lines as necessary; repairing leaks; pumping; taking lines from the tug boats; responding to whistle signals; slackening lines; putting out navigational lights and signals, and taking general orders from the tugboats as necessary. The barge had no motive power and no wheel, and Rusin, as bargemaster, was entirely subject to the control of the tugboat captain, and could not set his own course or control or change it at any time.

When the matter was heard before me on the Motion to
12 Dismiss, and in accordance with my direction, Rusin testified as to his prior experience as a boatman or seaman. It was agreed by the parties that this testimony should be treated as supplementing the record made by the Commissioner.

Rusin testified that before he was employed by the Warner Company, his occupation was that of a painter; that he had been a painter for about thirty-five years; that he had never served as a master or officer; that he had never had any seamen's or master's certificates or papers of any kind; that in 1908 he had worked as a seaman on a Merchant and Miners vessel plying between Philadelphia and Boston for about six months; that in

1930 he had worked on a dredge owned by the United States Engineering Department along shore for "a couple of months." He was employed by the Warner Company for about two years, from mid-1936 to mid-1938. When he left the Warner Company in 1938 he was employed intermittently as a painter by Girard College in Philadelphia for about two years. He was re-employed by the Warner Company about three months before the accident.

While the plaintiff in its brief (p. 6) described Rusin as "an experienced seaman, having spent most of his life in that occupation prior to being employed by the Warner Company," there was no testimony offered by the plaintiff in support of that contention.

The sum and substance of the testimony then is that Rusin was employed as a bargeman with duties substantially similar in nature to the bargemen in De Wald v. Baltimore & O. R. Co., 71 F. 2d 810; Diomede et al. v. Lowe, Deputy Commissioner, 87 F. 2d 296; The A. H. Chamberlain, 206 F. 996, 998; South Chicago Coal & Dock Co. et al. v. Bassett, Deputy Commissioner, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732; Loverich v. Warner Co., 118 F. 2d 690, 694, cert. denied 313 U. S. 577, 61 S. Ct. 1104, 85 L. Ed. 1535.

In all of the cases cited, with the exception of Loverich v. Warner Co., supra, it was held that the barge masters
13 did not come within the category of "a master or member of a crew" and hence were subject to the exclusive jurisdiction of the Longshoremen's Act.

In the Loverich case, the United States Circuit Court of Appeals for this Circuit ruled that the bargemen employed upon one of the Warner Company barges of the same type as that involved in the instant proceeding came within the category of "a master or member of a crew" and was therefore exempt from the scope of the Longshoremen's Act, and allowed him to recover in admiralty.

In Berwind-White Coal Mining Co. v. Rothensies, 45 F. Supp. 55, 60 (decided May 15, 1942), in which the question involved was whether "barge captains" were exempt from social security taxes "as an officer or member of the crew", I ruled that the barge captains performing substantially the same duties as the bargeman in the instant case, were not exempt.

In my opinion, I discussed in detail the history of the Longshoremen's Act and the decision thereunder. I there pointed out that the Loverich case turned largely on the fact that the bargeman was an experienced, qualified seaman, as stated in the opinion of the Circuit Court at p. 694:

"He was not a mere watcher of a coal chute * * *. He was a licensed junior engineer and water tender and qualified as an

able seaman and barge master, 2nd mate and 3rd mate. * * * he operated the entire barge, whose voyages sometimes took six weeks. He was, therefore, in our judgment, not a harbor worker, but a seaman."

Since the bargeman in the instant case was not an experienced, qualified, licensed or certificated seaman, I am of the opinion that the ruling in the Loverich case is not dispositive on the question here involved.

It is important to note that the Circuit Court of Appeals in the Loverich case specifically noted that the fact situation
14 there was an "exception" such as was explained and applied by the Supreme Court of the United States in South Chicago Coal & Dock Co., et al. v. Bassett, Deputy Commissioner, supra.

In Berwind-White Mining Co. v. Rothensies, supra, I pointed out that in its opinion the Supreme Court of the United States in the South Chicago Coal & Dock Co. case, in discussing the legislative history of the Longshoremen's Act, stressed the fact that it was at one time amended so as to include a master and members of a crew of a vessel; that later the bill was amended so as to exempt "seamen"; that in final pasage, however, the words "master or member of a crew" were substituted for "seamen".

Referring to this final change, the court said at page 257 of 309 U. S., at page 547 of 60 S. Ct., 84 L. Ed. 732:

"* * * We think that this substitution has an important significance here. For we had held that longshoremen engaged on a vessel at a dock in navigable water, in the work of loading or unloading, were 'seamen'. International Stevedoring Co. v. Haverty, 272 U. S. 50, 47 S. Ct. 19, 71 L. Ed. 157; Northern Coal & Dock Co. v. Strand, 278 U. S. 142, 49 S. Ct. 88, 73 L. Ed. 232. And, also, that such seamen if injured on a vessel in navigable waters, unlike one injured on land, could not have the benefit of a state workmen's compensation Act. Southern Pacific Co. v. Jensen, 244 U. S. 205, 37 S. Ct. 524, 61 L. Ed. 1086 L. R. A. 1918C, 451, Ann. Cas. 1917E, 900. We think it is clear that Congress in finally adopting the phrase 'a master or member of a crew' in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel and to whom state compensation statutes were inapplicable."

In Nogueira v. New York, N. H. & H. R. Co., 281 U. S. 128, 50 S. Ct. 303, 74 L. Ed. 754, the Supreme Court also pointed out the changes made in the Longshoremen's and Harbor Workers' bill.

15 The phrase "master or member of a crew" was interpreted in the case of De Wald v. Baltimore & O. R. Co., 71 F. 2d 810 (1934). In this case the Circuit Court of Appeals for the Fourth Circuit held that a bargeman whose functions were very similar to the barge captains in Berwind-White Coal Mining Co., supra, did not come within the meaning of the phrase "master or member of a crew." The bargemen's duties in the De Wald case consisted of the checking and supervising of the loading and unloading of cargoes from the barge to steamships, and vice versa; seeing that the cargo was safely loaded and unloaded; opening and closing hatches on the barge, and putting in gangway boards; pumping water out of the barge, and making lines fast and unfast at docks or alongside vessels when the barge was moved about the harbor. The bargeman was not responsible for the navigation of the barge, and performed no duty in connection with such navigation, except the incidental one of making lines fast or unfast when tying up at docks or alongside vessels. The barges had no motive power equipment or steering apparatus, and were towed by tug boats.

Said the court, in ruling that the bargeman was not "a master" or "member of a crew," at page 813 of 71 F. 2d:

"Obviously De Wald was not a master. The A. H. Chamberlain, D. C., 206 F. 996. The judge below readily reached this conclusion. Nor in our opinion was he a member of a crew. He was the only man working on the barges in any capacity. 'Crew' is a collective noun and signifies 'the ship's company'. The Marie, D. C., 49 F. 286; Seneca Washed Gravel Corporation v. McManigal, 65 F. 2d 779; United States v. Winn, 28 Fed. Cas. p. 733, No. 16,740."

In Diomede et al. v. Lowe, Deputy Commissioner, 87 F. 2d 296 (1937), the employee involved was in entire charge of a non self-propelled dump scow. He lived on board the scow, which
16 was operated within New York Harbor, and occasionally outside the Harbor. His duties consisted of the loading and dumping operations of the scow; watching for leaks; making minor repairs; pumping out water; fastening and unfastening lines from the scow to the dock and from the tug boat to the scow, and keeping running lights in order and visible.

The Circuit Court of Appeals for the Second Circuit held in the Diomede case that the employee could not be classified as a "master" because he had no men to command and no ship to navigate; and further, that he was not a "member of a crew" because he was not aiding in navigation.

Said the court at page 298 of 87 F. 2nd:

"In the A. H. Chamberlain, D. C. E. D. N. Y., 206 F. 996, 998, in a well-considered opinion, the District Judge said, speaking of the status of one who was in charge of a scow: 'The captain of a scow or barge, who does the work of a deckhand, and does not have the right to control the vessel's movements nor employment, and can act only as agent, in the sense that any sailor might act under specific direction of his captain, is not a master.'

"We agree and think it is impossible to classify an employee in charge of a dump scow, a boat without means of self-propulsion, and unmanned except for its 'captain,' as the master of a vessel. De Wald v. Baltimore & O. R. Co., supra. A 'master' without men to command, without a ship to navigate, and subject to the orders of the tug captain when the scow is in tow, is a notion difficult to accept and untenable when it is sought thereby to exclude the decedent from the remedy provided by the Act.

"Nor was the decedent the member of a crew. * * * The word "crew" is used in the statute to connote a company of seamen belonging to the vessel, usually including the officers.
17 It is the "Ship's company." United States v. Winn, 28 Fed. Cas. page 733, No. 16,740. The crew is usually referred to and is naturally and primarily thought of as those who are on board and aiding in the navigation without reference to the nature of the arrangement under which they are on board. The Bound Brook, D. C., 146 F. 160, 164; The Buena Ventura, D. C. 243 F. 797, 799.'"

In Moore Dry Dock Co. v. Pillsbury et al., 1938, 100 F. 2d 245, the Circuit Court of Appeals for the Ninth Circuit cited with approval the ruling in Diomede v. Lowe, supra, and De Wald v. Baltimore & O. R. Co., supra.

In Blaske v. Bassett, 35 F. Supp. 315, 316, the court distinguished between the "sort of work performed by longshoremen and harbor workers * * * and the duties of those employees on a vessel who are naturally and primarily on board to aid in the navigation of the boat," and ruled that a man performing substantially the same duties as the bargeman in the instant case came within the jurisdiction of the Longshoremen's Act and was not "a master or member of a crew."

For the reasons above stated, I am of the opinion that the bargeman Rusin in the instant proceeding did not come within the category of "a master or member of a crew," and accordingly the Motion to Dismiss the Complaint is granted.

18 In United States District Court

Judgment

Filed July 23, 1942

Before KALODNER, J.

And now, to wit: July 23, 1942, in accordance with the Opinion of the Court granting defendant's Motion to Dismiss, it is

Ordered that the above action be and the same is hereby dismissed, with costs to the defendants.

By the Court:

Attest:

(S) GILBERT W. LUDWIG,
Deputy Clerk.

19 In the United States Circuit Court of Appeals
for the Third Circuit

No. 8131—October Term, 1942

WARNER COMPANY, APPELLANT

vs.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, AND NICHOLAS RUSIN, APPELLEES

Minute entry

And afterwards, to wit, the 20th day of November 1942, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable Charles Alvin Jones, and Honorable Herbert F. Goodrich, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the 17th day of June 1943, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

In the United States Circuit Court of Appeals
for the Third Circuit

No. 8131—October Term 1942

WARNER COMPANY, PLAINTIFF-APPELLANT

v.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, DEFENDANT-APPELLEE

and

NICHOLAS RUSIN, DEFENDANT-APPELLEE

Appeal from the District Court of the United States for the Eastern District of Pennsylvania

Opinion

(Filed June 17, 1943)

Before MARIS, JONES, and GOODRICH, Circuit Judges

JONES, Circuit Judge.

This is an appeal by an employer from an order of the District Court dismissing its suit to set aside an award of compensation entered by the Deputy Commissioner under the Federal Longshoremen's and Harbor Workers' Compensation Act,[1] in favor of an employee for injuries received while employed as a bargeman. The ultimate question is whether the employee was "a master or member of a crew" of a vessel within the meaning of the Act which expressly excludes from its purview, inter alia, "A master or member of a crew of any vessel * * *" 33 U. S. C. A. § 903. The Commissioner, on the facts found by him, concluded that the claimant was a harbor worker and not a master or member of a crew and that he was therefore entitled to the benefits of the Compensation Act. The District Court ruled to like effect.

In reviewing the action of the court below we necessarily take as conclusive the facts as found by the Commissioner in so far as they are supported by substantial evidence. South Chicago Coal & Dock Co. v. Bassett, 309 U. S. 251, 253, 258. At the hearing upon the employer's complaint, the District Court took additional evidence but, in the end, accepted the Commissioner's findings of

[1] 44 Stat. 1424, c. 509, § 3, 33 U. S. C. A., § 903 et seq.

fact in toto, merely amplifying them in certain particulars as the additional evidence, which was received with the consent of all parties, consistently warranted. The evidentially supported basic findings, as to the merit of which there is no controversy, disclose the following factual situation.

The claimant suffered the injuries for which he seeks compensation from a fall while employed on a barge of the Warner Company on navigable waters of the United States. As the Deputy Commissioner specifically found, the fall was occasioned by the pulling out of a hand-operated capstan on deck which the bargeman was engaged in turning to take up the mooring line running from the barge to a pier to which he was endeavoring to warp the vessel. At the time of his injury he was the only person aboard or employed upon the barge. He had succeeded in propelling it the greater part of the distance of the desired movement against difficulties of wind and tide, which were augmented by the weight of the barge, when the capstan bar pulled out, struck him on the chest and caused him to fall, whereby the injuries for which he makes claim were inflicted.

The barge was a documented vessel under the Customs Laws of the United States. It had no motive power of its own and was propelled ordinarily by being towed by a tugboat to ports of call on navigable inland waters of the United States within a radius of thirty miles of the employer's plant in Philadelphia. It was also customary for the bargeman to propel the barge for short distances by winding up a mooring or towing cable by means of the hand-operated capstan.

The duties of a bargeman embrace the care of his barge by repairing leaks, pumping out excess water and seeing in general as to the seaworthiness of the vessel. For that purpose he lives aboard the barge, eating and sleeping in quarters there provided for his use and supplying his own food. It is also his duty to make fast and to unfasten mooring lines at dock and to change them as necessary by tightening or slackening them, to take
21 tow lines from tugboats and to lengthen or slacken them when necessary, to set out navigational lights or signals, to respond to whistle signals from the barges tow boat and to take orders from the tugboat captain to whose control the bargeman is subject while his barge is in tow. Rusin, the claimant, was paid a flat monthly salary for his service as bargeman and, when he worked on any other boat, he received additional compensation at an hourly rate for the time so engaged. His employment was subject to the provisions of a contract between the Harbor Boatmen's Union and the Warner Company wherein it was provided, inter alia—

"SECTION 6. All Bargemen assigned to specific barges in active operation shall be paid a monthly salary of $80.00 and shall be provided with quarters. This compensation is for all work performed by Bargemen in the operation of his own vessel.

"SECTION 7. The rates as provided herein are based upon all services and time required to safeguard and operate the barge fleet, including necessary pumping, watching or other emergency duties on Sundays and holidays."

While the question as to whether a particular claimant is "a master or member of a crew" of a vessel and therefore excluded from the Compensation Act is one of fact, it is necessarily an ultimate conclusion to be derived from an application of the statute to the basic findings of fact. As such, it is open to court review for a determination of its validity on the basis of the supportable facts as found by the Commissioner. In short, a Commissioner's conclusion that one is or is not "a master or member of a crew" is not binding upon a reviewing court if the basic facts competently found by the Commissioner rightly call for a different conclusion.

In Loverich v. Warner Co., 118 F. 2d 690 (C. C. A. 3), cert. den. 313 U. S. 577, we sustained a bargeman's claim against the same employer, as is here involved, for maintenance and cure under maritime law for an illness consequent upon an accident occurring in the course of the claimant's employment. In so doing, we expressly ruled that the bargeman was a seaman and not a harbor worker, and that his claim against the employer fell within the specific exclusion in the Compensation Act. This ruling was directly material to the decision in the Loverich case, for not otherwise could the libellant's judgment for maintenance and cure have been sustained in its entirety. The employer had there defended on the ground that so much of the libellant's claim as had accrued after the effective date of the Compensation Act was compensable under that statute, as, indeed, it would have been had the claimant not been held to have been excluded by that Act. To employees entitled to the benefits of the Longshoremen's Compensation Act the remedy thereby afforded is exclusive. South Chicago Coal & Dock Co. v. Bassett, supra, at p. 256.

The court below sought to distinguish the Loverich case from the present and held the ruling there made to be inapplicable to the instant case. We fail to see any material differences in the facts of the two cases. It is true that in the Loverich case,
22 in specifying the duties of the bargeman and the circumstances under which he performed them, we mentioned that Loverich was a licensed junior engineer and qualified as an able seaman, barge master and second and third mate. But those added attainments of the particular employee were not what con-

stituted him a seaman. The determining factors were the duties he was called upon to perform and the circumstances under which he was required to perform them. The question concerned his actual duties. Cf. South Chicago Coal & Dock Co. v. Bassett, supra, at p. 260. Where such duties pertain to the welfare and operation of the vessel, the employee is a seaman and, as such, is the master or a member of the crew of the vessel, as the case may be. Cf. Gale v. Union Bag & Paper Corporation, 116 F. 2d 27, 28 (C. C. A. 5), where the navigational character of a bargeman's duties is clearly set forth. See also A. L. Mechling Barge Line v. Bassett, 119 F. 2d 995, 998, where the Court of Appeals for the Seventh Circuit, whose earlier decision in the South Chicago case (104 F. 2d 522) was affirmed by the Supreme Court, as cited supra, held a cook on a barge to be "a member of a crew", and therefore excluded from the Longshoremen's and Harbor Workers' Compensation Act, since his services were in aid and support of the navigation of the barge and not independent thereof. On the other hand, if the employee is concerned primarily with the loading or unloading of the vessel, even though he works upon navigable waters, he is a harbor worker and not a seaman. "Workers of that sort on harbor craft may appropriately be regarded as 'in the position of longshoremen or other casual workers on the water.'" South Chicago Coal & Dock Co., supra, at p. 260, citing Scheffler v. Moran Towing Co., 68 F. 2d 11, 12. The distinction thus indicated was fundamental to our ruling in the Loverich case whose facts as to the employee's duties and services aboard the barge are indistinguishable from the facts of the instant case.

In the South Chicago case, supra, the matters which were deemed (p. 260) to justify the Commissioner's conclusion that the claimant in that case was not a "master or member of a crew" were that his primary duty was to facilitate the flow of coal to the vessel being fueled from the lighter upon which he worked, that he had no duties while the lighter was in motion, that he slept at home and boarded off ship and that he was called for service each day as wanted and was paid an hourly rate. Some of the same restricted characteristics of employment are to be noted in DeWald v. Baltimore & O. R. Co., 71 F. 2d 810, 811 (C. C. A. 4), Moore Dry Dock Co. v. Pillsbury, 100 F. 2d 245 (C. C. A. 9), and Henderson v. Jones, 110 F. 2d 952 (C. C. A. 5). On the other hand, in the instant case, just as in the Loverich case, the claimant's duties required him to be aboard the barge and to be concerned with its management, care, and operation. He was therefore a seaman and, as such, comes within the description of those who, as master or member of a crew, are expressly excluded from the remedy provided by the Compensation Act.

23 The judgment of the District Court is reversed and the cause remanded for further proceedings in conformity with this opinion.

A true Copy:
Teste:

_____,
Clerk of the United States Circuit Court of Appeals for the Third Circuit.

In the United States Circuit Court of Appeals for the Third Circuit

No. 8131—October Term, 1942

WARNER COMPANY, APPELLANT

vs.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, AND NICHOLAS RUSIN, APPELLEES

Present: MARIS JONES, and GOODRICH, Circuit Judges

On appeal from the District Court of the United States for the Eastern District of Pennsylvania

Judgment

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause is remanded to the said District Court for further proceedings in conformity with the opinion of this court.

By the Court,

JONES, *Circuit Judge.*

JUNE 17, 1943.

[Endorsements:] Order Reversing Judgment, etc. Received & Filed June 17, 1943. Wm. P. Rowland, Clerk.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Set.

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Brief for Appellant, as constituting the portions of the record before

this court at argument; and proceedings in this court, in the case of Warner Company, Appellant vs. Augustus P. Norton, Deputy Commissioner for the Third Compensation District, and Nicholas Rusin, Appellees, No. 8131, on file, and now remaining among the records of the said Court in my office.

24 In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 9th day of September in the year of our Lord one thousand nine hundred and forty-three, and of the Independence of the United States the one hundred and sixty-eighth.

WM. P. ROWLAND.
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

In the Supreme Court of the United States

[Title omitted.]

Stipulation

Subject to the approval of this Court, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that, for the purpose of the petition for a writ of certiorari, the printed record may consist of the following:

Appendix to the brief for appellant filed in the United States Circuit Court of Appeals for the Third Circuit and the proceedings in that court.

It is further stipulated and agreed that the petitioners will cause the Clerk of the United States Circuit Court of Appeals for the Third Circuit to certify and file the entire transcript of the record now on file in his office with the Clerk of this Court, and that in the event the petition for a writ of certiorari is granted, the printed record shall consist of the proceedings in the United States Circuit Court of Appeals for the Third Circuit and such portions of the entire transcript of the record, certified by the Clerk of that Court, as the respective parties may designate.

It is further stipulated and agreed that the parties may refer in the petition and briefs to any portions of the certified typewritten transcript of record which are not included in the printed record to be filed in accordance with this stipulation.

_____
Solicitor General,
Counsel for Petitioners.

Dated: September —, 1943.

_____
Counsel for Respondent.

Dated: September —, 1943.

25 In the Supreme Court of the United States

[Title omitted.]

Stipulation

Subject to this Court's approval, it is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that, for the purpose of the hearing of this case, the printed record may consist of the following:

Appendix to the brief for appellant filed in the United States Circuit Court of Appeals for the Third Circuit and the proceedings in that court.

It is further stipulated and agreed that either party may refer in his brief or oral argument to any portions of the certified typewritten transcript of record, filed with this Court, whether or not they are included in the printed record.

CHARLES FAHY,
Solicitor General,
Counsel for Petitioners.

Dated: December 4, 1943.

SHIELDS, CLARK, BROWN & MCCOWN,
S. B. FORTENBAUGH, JR.
Counsel for Respondent.

Dated: December 7, 1943.

26 Supreme Court of the United States

Order allowing certiorari

Filed November 8, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] Enter Attorney General. File No. 47855. U. S. C. C. of Appeals, Third Circuit. Term No. 362. Augustus P. Norton, Deputy Commissioner for the Third Compensation District, Petitioner vs. Warner Company. Petition for writ of certiorari and exhibit thereto. Filed September 17, 1943. Term No. 362 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 362

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, PETITIONER

v.

WARNER COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of A. P. Norton, Deputy Commissioner, United States Employees' Compensation Commission, respectfully prays that a writ of certiorari be issued to review the judgment entered in the above-entitled cause by the United States Circuit Court of Appeals for the Third Circuit on June 17, 1943.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 9–17) is not reported. The opinion of the Circuit Court of Appeals (R. 19–23) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 17, 1943 (R. 23). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the finding of the Deputy Commissioner, that a bargeman is not "a master or member of a crew" within the exclusionary provision of Section 3 (a) (1) of the Longshoremen's and Harbor Workers' Compensation Act, is conclusive if reasonably inferable from undisputed basic facts.

STATUTE INVOLVED

Section 3 (a) (1) of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C. sec. 903 (a) (1)), provides:

> SEC. 3. *Coverage.* (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; * * *.

STATEMENT

The facts in the instant case are undisputed and are as follows:

Rusin was employed as a bargeman by the respondent. As such, his duties consisted of the general care of the barge or lighter to which he was at any time assigned, including making lines fast and unfast at docks, and tightening or slackening them as necessary. (R. 10.) By means of a hand-operated capstan he occasionally assisted in shifting the barge which had no motive power of its own but was towed from place to place (R. 10). For that purpose he lived aboard the barge (R. 11), which was documented as a vessel of the United States (see R. 20), eating and sleeping in quarters there provided for his use and supplying his own food (R. 11). The operation of the barge was confined to waters within a radius of thirty miles of Philadelphia (R. 10-11). As bargeman, Rusin was usually subject to orders of respondent's marine superintendent (R. 6), but when in tow he was subject to the control of the tugboat captain. He could not set his own course or control or change it at any time. (R. 11.) He was "unarticled" and had no experience as a

seaman other than that obtained as a bargeman (R. 12). He was paid a flat monthly salary for his service as bargeman, and when he worked on any other boat he received additional compensation at an hourly rate (R. 11). His employment was subject to the contract between the Harbor Boatmen's Union and the Warner Company, which provided, *inter alia* (R. 11):

> Section 6: All Bargemen assigned to specific barges in active operation shall be paid a monthly salary of $80.00 and shall be provided with quarters. This compensation is for all work performed by Bargemen in the operation of his own vessel.
>
> Section 7: The rates as provided herein are based upon all services and time required to safeguard and operate the barge fleet, including necessary pumping, watching, or other emergency duties on Sundays and holidays.

Rusin was injured when the capstan bar, which he was using to shift the barge at a pier, pulled out and struck him upon the chest and caused him to fall (R. 10). At the time, he was the sole person aboard or employed upon the barge. He thereafter filed a claim for compensation with the Deputy Commissioner.

On the basis of the foregoing facts, the Deputy Commissioner found that Rusin was not a "master or member of a crew," but a harbor worker, entitled to the benefits of the Longshoremen's and

Harbor Workers' Act (R. 9), and granted him a compensation award (see R. 20).

Thereafter pursuant to Section 21 (b) of the Longshoremen's and Harbor Workers' Act (33 U. S. C. sec. 921 (b)), respondent filed suit in the district court to set aside the compensation award (R. 9). The district court affirmed the findings of the Deputy Commissioner, and dismissed the complaint (R. 18).[1]

On appeal, the court below reversed the decree of the district court (R. 23). It recognized that the question whether a particular claimant is "a master or member of a crew" and therefore excluded from the Longshoremen's Act is one of fact, but held that the ultimate findings of fact of the Deputy Commissioner are "not binding upon a reviewing court if the basic facts competently found by the Commissioner rightly call for a different conclusion" (R. 21). Accordingly it found Rusin to be a seaman excluded from the benefits of the Act (R. 22).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals for the Third Circuit erred:

1. In failing to hold that the finding of the Deputy Commissioner that Rusin was not "a mem-

[1] At the hearing before the district court, additional evidence was introduced by consent of the parties. The district court, although it amplified upon the findings of the Deputy Commissioner, in the end accepted these findings *in toto* (R. 11-12).

ber of a crew," but a harbor worker entitled to the benefits of the Act, was conclusive, since it was a reasonable inference from the basic facts.

2. In undertaking to determine, independently of the Deputy Commissioner's ultimate finding, whether Rusin was a harbor worker covered by the Act or "a member of a crew" excluded from the benefits of the Act.

3. In holding, despite the finding of the Deputy Commissioner to the contrary, that Rusin was in fact "a member of a crew" and therefore excluded from the benefits of the Act.

4. In reversing the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The Longshoremen's and Harbor Workers' Compensation Act provides specifically in Section 3, relating to "Coverage," that no compensation shall be payable in respect of the disability or death of a "master or member of a crew of any vessel." In the present case, the Deputy Commissioner found that at the time of his injury Rusin was not "a member of a crew," but rather was a harbor worker (R. 20); the district court sustained this finding (R. 17). The court below accepted the basic findings of fact made by the Deputy Commissioner, properly holding that they are conclusive since supported by substantial evidence. However, the court proceeded to consider the propriety of the conclusion or inference drawn

by the Deputy Commissioner from those basic facts, i. e., that Rusin was not a master or member of a crew, holding that "a Commissioner's conclusion" to this effect "is not binding upon a reviewing court if the basic facts competently found by the Commissioner rightly called for a different conclusion" (R. 21). After such consideration the court below concluded that the Deputy Commissioner's determination was improper principally on the ground that its earlier decision in *Loverich* v. *Warner Co.*, 118 F. (2d) 690, certiorari denied, 313 U. S. 577, involving a claim of a bargeman for maintenance and cure under the maritime law, held that a bargee performing Rusin's duties was a member of a crew. In so holding, the lower court failed to give proper effect to the decision of this Court in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251. Moreover, in setting aside the award in this borderland area, the decision below is in probable conflict with *Davis* v. *Department of Labor*, 317 U. S. 249, and presents a question of substantial importance in the administration of the Act, particularly as it affects bargemen. And if the question is viewed as one of law, the decision below is in conflict with *Diomede* v. *Lowe*, 87 F. (2d) 296 (C. C. A. 2), certiorari denied, 301 U. S. 682, and *De Wald* v. *B. & O. R. Co.*, 71 F. (2d) 810 (C. C. A. 4), certiorari denied, 293 U. S. 581.

1. In the *South Chicago* case, as in the instant case, either inference could probably have been

drawn from the basic facts which were undisputed. There this Court, citing its prior decision in *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166, held that the inference or conclusion to be drawn from these facts was for the Deputy Commissioner and not for the courts, and that the Deputy Commissioner's conclusion that the decedent was "a member of a crew" was conclusive if supported by evidence (p. 258). This accords with the well-settled rule that inferences drawn by a Deputy Commissioner from facts supported by substantial evidence are final. *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287; cf. *Davis* v. *Department of Labor*, 317 U. S. 249, 256; *Gray* v. *Powell*, 314 U. S. 402, 412. The doctrine of the *South Chicago* case as to the finality of the Deputy Commissioner's findings has been reaffirmed by this Court in *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246, and in *Marshall* v. *Pletz*, 317 U. S. 383, 388.[2] It has been followed in numerous cases by the lower federal courts which have held that the question whether a par-

[2] In *Cantey* v. *McLain Line, Inc.*, 312 U. S. 667, this Court reversed, without argument a decision which denied recovery to a bargeman under the maritime law, where the lower courts deemed their prior decision in *Diomede* v. *Lowe*, 87 F. (2d) 296 (C. C. A. 2), allowing recovery under the Longshoremen's Act, to be controlling. We interpret this Court's reversal and remand as reaffirming the proposition that in borderline cases the question whether a claimant was a member of a crew is one of fact to be found as such by the trier of fact.

ticular claimant is a member of the crew is one of fact to be decided by the Deputy Commissioner. See, e. g., *Henderson* v. *Jones*, 110 F. (2d) 952 (C. C. A. 5); *Puget Sound Freight Lines* v. *Marshall*, 125 F. (2d) 876 (C. C. A. 9); *Pacific Employers Insurance* v. *Pillsbury*, 130 F. (2d) 21 (C. C. A. 9); *Gulf Oil Corp.* v. *McManigal*, 49 F. Supp. 75 (N. D. W. Va.); *Blaske* v. *Bassett*, 35 F. Supp. 315 (E. D. Mo.). The facts in the instant case, although perhaps permitting the contrary inference, clearly support the Deputy Commissioner's ultimate finding. Rusin had no seaman's papers; he had been a painter for thirty-five years; he furnished his own meals in the barge; he received additional compensation for work on other barges; the barge had no complement other than Rusin; and the barge itself was without motive power and had to be towed. The barge served only rivers and harbors within 30 miles of Philadelphia (R. 10) and hence was not required to be manned by persons having certificates of efficiency or service as seamen (46 U. S. C. sec. 672). The decision of the lower court in the instant case, in refusing to recognize the finality of the inference and finding of the Deputy Commissioner that Rusin was not "a member of a crew," conflicts with the decisions above cited.

2. The court below, by relying upon its decision in the *Loverich* case, *supra*, treated as a

question of law[3] what this Court had held in the *South Chicago* case was an inference to be made by the Deputy Commissioner. Viewed as a conclusion of law, the decision of the lower court conflicts with *Diomede* v. *Lowe*, 87 F. (2d) 296 (C. C. A. 2), certiorari denied, 301 U. S. 682, and *Dewald* v. *B. & O. R. Co.*, 71 F. (2d) 810 (C. C. A. 4), certiorari denied, 293 U. S. 581, holding that bargees with duties substantially the same as Rusin's were not, as a matter of law, masters or members of a crew but rather harbor workers entitled to the benefits of the Longshoremen's Act.

3. The decision in the instant case adversely affects a large class of maritime workers, such as bargemen, and if allowed to stand would deny to a great number of them social and economic benefits which the Longshoremen's and Harbor Workers' Act intended to provide.

The whole economic and social basis for the exemption of the members of a crew from coverage under the Act does not apply to bargemen. The

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[3] The lower court in *Berwind-White Coal Mining Co.* v. *Rothensies*, No. 8074, not yet officially reported (also decided on June 17, 1943), reversed a district court decision sustaining a Social Security tax upon wages paid bargees whose duties were similar to those of Rusin, holding upon grounds similar to those in the instant case that such wages fell within the provisions of Section 811 (b) (5) of the Social Security Act (49 Stat. 639; 53 Stat. 1400; 42 U. S. C. sec. 1011 (b) (5)) excepting from the Act wages paid for "service performed as an officer or member of the crew of a vessel documented under the laws of the United States * * *"

exemption was inserted at the request of the seamen's unions (68 Cong. Rec. 5414), of which bargemen are not members. The exemption reflects the fact that the members of a ship's company receive medical care and treatment aboard ships or in marine hospitals without expense to themselves, are entitled to small payments for maintenance and cure during disability and hospitalization, and usually have an accumulation of wages at the end of a voyage (46 U. S. C. secs. 596, 597)—factors making it possible for them to undergo a period of disability without hardship. But none of these applies to bargemen as a class.

Barges of the type involved in this case are exempt from documentation (46 U. S. C. secs. 332, 335) and the bulk of them are not documented;[1] consequently bargemen are in general not entitled to hospitalization or treatment at the marine hospitals, which are available only to "merchant marine seamen" (24 U. S. C. secs. 26, 26 (a)), that is, seamen aboard documented vessels of the United States (42 C. F. R. secs. 2.21–2.46). Nor is the bargeman afforded care aboard his craft when injured, for there are neither facilities nor personnel to care for him. Bargemen frequently live ashore and customarily go home at night, leaving their

[1] For reasons which do not appear, the owners of the barge in the instant case elected to have it documented.

vessels unattended.[5] They are paid periodically, do not receive accumulated wages at the end of a voyage, and must meet the daily expenses of themselves and their families (cf. R. 11). Such workers require the prompt and sure relief afforded by the Compensation Act; and can hardly afford to sacrifice the more certain if more modest benefits of the Act for a possibly greater recovery under the Jones Act (46 U. S. C. sec. 688) after the law's delays.

The Deputy Commissioner is entitled to consider these marked differences in economic factors when drawing his inference as to whether a particular bargeman is a harbor worker or a member of a crew. The substitution of the judgment of the courts for that of the Deputy Commissioner on such an issue serves to encourage protracted litigation in the borderline situations and tends to defeat the purpose of Congress to alleviate economic hardship to a large class of workmen.

4. It is true that reversal of the lower court's decision might produce a result whereby employees who fall in the shadowy area between harbor workers and members of the crew of a

[5] This custom has been recognized in this Court and elsewhere, and the practice has been held not to give rise to fault. *The Granite State*, 3 Wall. 310; *The Bridgeport*, 14 Wall. 116; *The Kathryn B. Guinan*, 176 Fed. 301 (C. C. A. 2); *The No. C-4*, 300 Fed. 757 (S. D. N. Y.), affirmed, 300 Fed. 761 (C. C. A. 2); *Goodwin-Gallagher Sand & Gravel Corp. v. Washington Bulkley, Inc.*, 31 F. (2d) 112, 114 (E. D. N. Y.), affirmed, 31 F. (2d) 115 (C. C. A. 2).

vessel are permitted to seek compensation under either law. This consequence is outweighed by the administrative benefits derived from according finality to the Deputy Commissioner's conclusions. As cases are constantly arising in which a Deputy Commissioner is called upon to determine whether a claimant is a member of a crew, if the decision below is allowed to stand it will unduly burden and interfere with the orderly administration of the Act. In *Davis* v. *Department of Labor*, 317 U. S. 249, 254, this Court recognized possible serious financial loss and loss of claim through operation of the statute of limitations while the injured employee was erroneously pursuing a remedy in the wrong tribunal, and refused to require employees to "determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership." The decision below conflicts in principle with the *Davis* case; the court below admittedly set aside the award of the Deputy Commissioner on the theory that the Longshoremen's Act and the maritime law cannot overlap and are mutually exclusive.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

SEPTEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 362

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT, PETITIONER

v.

WARNER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 6–12) is reported in 45 F. Supp. 835. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 14–18) is reported in 137 F. (2d) 57.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 17, 1943 (R. 18). The peti-

tion for certiorari was filed September 17, 1943, and was granted November 8, 1943 (R. 20). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the finding of the Deputy Commissioner, that a bargeman is not "a master or member of a crew" within the exclusionary provision of Section 3 (a) (1) of the Longshoremen's and Harbor Workers' Compensation Act, is conclusive if reasonably inferable from undisputed basic facts.

STATUTE INVOLVED

The pertinent provisions of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C., sec. 901, *et seq.*), are set forth in the Appendix, *infra*, pp. 36–37.

STATEMENT

The facts in the instant case are undisputed and are as follows:

Rusin was employed by the respondent as a bargeman. As such, his duties consisted of the general care of the barge or lighter to which he was at any time assigned, including making lines fast and unfast at docks, and tightening or slackening them as necessary (R. 7). By means of a hand-operated capstan he occasionally assisted

in shifting the barge which had no motive power of its own but was towed from place to place (R. 7). For that purpose he lived aboard the barge (R. 8), which was documented as a vessel of the United States (see R. 15); he ate and slept in quarters there provided for his use, and he supplied his own food (R. 8). The barge never went to sea (R. 8), its operation being confined to waters within a radius of thirty miles of Philadelphia, including rivers and tributaries within the states of Pennsylvania, New Jersey, and Delaware (R. 8). Its trips were not more than sixty miles in length and sometimes took fifteen days between loading and discharging, but the barge was under way only a small fraction of the time (R. 8). As bargeman, Rusin was usually subject to orders of respondent's marine superintendent (R. 4), but when in tow he was subject to the control of the tugboat captain (R. 8). He could not set his own course or control or change it at any time (R. 8). He was "unarticled" (R. 8) and had no experience as a seaman other that that obtained as a bargeman (R. 9). He was paid a flat monthly salary for his service as bargeman, and when he worked on any other boat he received additional compensation at an hourly rate (R. 8). His employment was subject to the contract between the Harbor Boatmen's Union and the Warner Company, which provided, *inter alia* (R. 8):

> Section 6: All Bargemen assigned to specific barges in active operation shall be paid a monthly salary of $80.00 and shall be provided with quarters. This compensation is for all work performed by Bargemen in the operation of his own vessel.
>
> Section 7: The rates as provided herein are based upon all services and time required to safeguard and operate the barge fleet, including necessary pumping, watching, or other emergency duties on Sundays and holidays.

Rusin was injured when the capstan bar, which he was using to shift the barge at a pier, pulled out and struck him upon the chest and caused him to fall (R. 7). At the time, he was the sole person aboard or employed upon the barge (R. 7). He thereafter filed a claim for compensation with the Deputy Commissioner.

On the basis of the foregoing facts, the Deputy Commissioner found that Rusin was not a "master or member of a crew," but a harbor worker, entitled to the benefits of the Longshoremen's and Harbor Workers' Act, and granted him a compensation award. (See R. 6.)[1]

Thereafter pursuant to Section 21 (b) of the Longshoremen's and Harbor Workers' Act (33 U. S. C. 921 (b)), respondent filed suit in the

[1] The material portions of the findings of the Deputy Commissioner which appear in their entirety at pp. 32–33 of the typewritten transcript of the record on file with the Clerk of this Court are set forth on p. 7 of the printed record.

district court to set aside the compensation award (R. 7). The district court affirmed the findings of the Deputy Commissioner, and dismissed the complaint (R. 12).[2]

On appeal, the court below reversed the decree of the district court (R. 18), and found Rusin to be a seaman excluded from the benefits of the Act (R. 17).

SPECIFICATION OF ERRORS

The court below erred:

1. In failing to hold that the finding of the Deputy Commissioner that Rusin was not "a member of a crew," but a harbor worker entitled to the benefits of the Act, was conclusive, since it was a reasonable inference from the basic facts.

2. In undertaking to determine, independently of the Deputy Commissioner's ultimate finding, whether Rusin was a harbor worker covered by the Act or "a member of a crew" excluded from the benefits of the Act.

3. In holding, despite the finding of the Deputy Commissioner to the contrary, that Rusin was in fact "a member of a crew" and therefore excluded from the benefits of the Act.

4. In reversing the judgment of the District Court.

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[2] At the hearing before the district court, additional evidence was introduced by consent of the parties. The district court, although it amplified upon the findings of the Deputy Commissioner, in the end accepted these findings *in toto* (R. 8).

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SUMMARY OF ARGUMENT

I. The determination by the Deputy Commissioner under the Longshoremen's and Harbor Workers' Compensation Act that an employee is not a member of a crew is a conclusion or inference entitled to finality if supported by the evidence and reasonably inferable therefrom (*South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251). The principle of finality of administrative determinations involving conclusions as to the coverage and application of the statute has been applied by this Court not only to determinations under the Longshoremen's Act, but also to similar determinations by regulatory agencies as to status under other statutes. The test is uniformly whether the determination has warrant in the record and a reasonable basis in law. (*Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146). Denial of finality to such determinations under the Longshoremen's Act would defeat the recognized Congressional purpose of providing a prompt and inexpensive method for the disposal of compensation claims. Certainly the questions presented are peculiarly suited to the examination and determination of the administrative agency especially assigned to that task. The possibility of inconsistent conclusions by courts in cases involving similar facts arising under the Jones Act or general admiralty law does not warrant the denial of finality, and the resulting interference with the orderly administration of the

Act. The existence of a "twilight zone" in which alternate remedies may be available is not objectionable where the attempt to establish certainty would place injured employees under the burden of correctly deciding in advance a controversial legal question. (Cf. *Davis* v. *Department of Labor*, 317 U. S. 249, 254.)

II. The Deputy Commissioner's conclusion that Rusin was a harbor worker and not a member of a crew is reasonably inferable from the basic undisputed facts. His navigational duties were incidental to his other duties, which were primarily those of a caretaker or watchman—classes of maritime workers clearly included under the Longshoremen's Act. There was thus plainly a rational basis for the Commissioner's conclusion.

III. The Commissioner's determination was likewise reasonable in light of applicable rules of law. If the conclusion that an employee is not a member of a crew is one of law, the court below nevertheless erred in setting aside the Deputy Commissioner's conclusion since it is clearly proper under the legislative history of the Act and the decisions thereunder. The exclusion from coverage of members of a crew resulted from opposition by the Seamen's Union to a prior provision including virtually all maritime workers. This Court in the *South Chicago* case recognized the Congressional intention to leave entitled to compensation "all those various sorts of longshoremen and harbor workers who were perform-

ing labor on a vessel and to whom state compensation statutes were inapplicable" (309 U. S. at 257), and cited with approval lower court decisions interpreting the exception as covering only seafaring men subject to the perils of the sea. Rusin plainly does not fit within this group, but belongs to a class of employees whose economic and social characteristics differ markedly from those of seamen.

ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act provides, in Section 3 entitled "Coverage," that compensation for disability or death resulting from an injury upon navigable waters of the United States shall be payable (except in certain circumstances) to employees, but that "no compensation shall be payable in respect of the disability or death of (1) a master or member of a crew of any vessel." (See Appendix, p. 36.)

The Deputy Commissioner found that Rusin's duties consisted of the general care of the barge or lighter to which he was at any time assigned, and that except for making lines fast and unfast at the dock and tightening or slackening them as necessary, he had no other duty in connection with the operation of the vessel. Accordingly, he held that Rusin was not "a master or member of a crew" but was a harbor worker entitled to compensation. The district court affirmed *in toto*

the findings and conclusion of the Deputy Commissioner, somewhat amplifying those findings. The court below accepted as binding the basic findings of fact of the Deputy Commissioner, on the authority of *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, but refused to be bound by his conclusion based on these findings because, according to the court, a Commissioner's conclusion that an employee is or is not "a master or member of a crew" is "necessarily an ultimate conclusion to be derived from the application of the statute to the basic findings of fact," and therefore "is not binding upon a reviewing court if the basic facts competently found by the Commissioner rightly called for a different conclusion" (R. 16). Because it thought applicable its earlier decision in a case involving a bargeman's claim for maintenance and cure under the maritime law (*Loverich* v. *Warner Co.*, 118 F. (2d) 690, certiorari denied, 313 U. S. 577), the court below reversed the judgment of the district court, and held Rusin to be a "member of a crew" and therefore excluded from the Act.

As we show in Point I, this holding is inconsistent with the decision of this Court in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, which in similar circumstances held that the conclusion in question is one to be drawn by the Deputy Commissioner and is entitled to finality if supported by evidence and in accordance with the applicable rules of law. That the

conclusion of the Deputy Commissioner was proper by these standards we discuss in Point II (*infra* pp. 22–25) and Point III (*infra* pp. 26–35). We also show in Point III that if the court below intended to rule that the conclusion of the Deputy Commissioner is one of law which may be reversed if the Court disagrees with it, it erred because such conclusion was correct even on this theory.

I

THE FINDING OF THE DEPUTY COMMISSIONER THAT RUSIN WAS NOT A MASTER OR MEMBER OF A CREW, IF SUPPORTED BY AND REASONABLY INFERABLE FROM UNDISPUTED BASIC FACTS, IS CONCLUSIVE

Section 19 of the Act, providing for the filing of a "claim for compensation," specifies that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." Section 21 (b) provides that a compensation order may be suspended or set aside through injunction proceedings instituted in the federal district courts "if not in accordance with law." By these sections, judicial review of a Deputy Commissioner's findings and order is limited to questions of law, leaving all factual questions to the Deputy Commissioner.[3]

[3] The legislative history indicates that Congress intended by these sections so to limit judicial review of the Deputy Commissioner's findings. See opinion of Mr. Justice Brandeis, dissenting in *Crowell* v. *Benson*, 285 U. S. 22, at 72–73.

Cf. *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166, 169; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287. But the Deputy Commissioner may do more than find the basic facts; he may draw a conclusion or inference therefrom. And if the facts permit "an inference either way * * *, the Deputy Commissioner * * * alone, is empowered to draw the inference; his decision as to the weight of the evidence may not be disturbed by the court" (*Del Vecchio* v. *Bowers*, 296 U. S. 280, 287).[1] The same principle is applicable to inferences and conclusions relating to questions of "coverage" under Section 3 of the Act (*South Chicago Coal and Dock Co.* v. *Bassett*, 309 U. S. 251; *Davis* v. *Department of Labor*, 317 U. S. 249, 256; cf. *Parker* v. *Motor Boat Sales*,

[1] In *Crowell* v. *Benson*, 285 U. S. 22, this Court, in order to avoid constitutional doubts, construed the Act to permit an independent judicial determination of so-called constitutional "jurisdictional" facts which bore upon the power of Congress to enact the statute. In the instant case, however, it is not disputed that Rusin was injured upon the navigable waters of the United States and was in the employ of respondent at the time of the injury—the questions which were considered in *Crowell* v. *Benson* to be determinative of the constitutional power of Congress. Since it is clear that Congress may constitutionally enact legislation affecting both longshoremen and members of a crew, *Crowell* v. *Benson* is not opposed to our contention here. On the contrary, that case affords affirmative support for our contention since the opinion of the Court states that on all other questions of facts, the findings of the Deputy Commissioner are final (285 U. S. at 46–47).

Inc., 314 U. S. 244). The only issue of law, in such a situation, is whether the Commissioner's conclusion is reasonably inferable from the basic facts. Cf. *Voehl* v. *Indemnity Ins. Co.*, 288 U. S. 162, 166, 169; *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287.

The *South Chicago* case is closely apposite here. The basic facts were undisputed; the Deputy Commissioner had found that the employee was not "a member of a crew" and had awarded compensation; the employer contended that this was a question of law for the courts and hence to be guided by decisions (not arising under the Act) which had defined the term in a manner thought to prevent its application to the employee concerned (309 U. S., at 253). This Court expressly rejected petitioner's contention that the question of whether the employee was "a member of a crew" was one of law, holding that "the word 'crew' does not have an absolutely unvarying legal significance" (p. 258) and that its meaning should be "define[d] * * * for the purpose of a particular statute which must be read in the light of the mischief to be corrected and the end to be attained" (p. 259). The Court concluded that "even if it could be said that the evidence permitted conflicting inferences, we

think that there was enough to sustain the deputy commissioner's ruling" (309 U. S., at 260–261).

Similarly in *Parker v. Motor Boat Sales, Inc.*, 314 U. S. 244, involving *inter alia* the question whether the employee was acting in the course of his employment—again a question requiring an inference or conclusion from undisputed facts—this Court held that "granting more than one possible conclusion could have been reached

[1] In *Cantey v. McLain Line, Inc.*, 312 U. S. 667, the Second Circuit Court of Appeals had denied recovery to a bargeman for maintenance and cure under the maritime law, holding that he was not a "member of a crew" and hence entitled to the exclusive remedy under the Longshoremen's Act. Both lower courts (32 F. Supp. 1023 (S. D. N. Y.), 114 F. (2d) 1017 (C. C. A. 2)) deemed controlling the prior decision of the Second Circuit in *Diomede v. Lowe*, 87 F. (2d) 296, certiorari denied, 301 U. S. 682, allowing recovery under the Longshoremen's Act to a bargeman in similar circumstances. This Court granted certiorari and in a memorandum *per curiam* opinion, reversed and remanded without argument (312 U. S. 667), citing *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 258–259. We interpret that reference as again rejecting the proposition that the question whether an employee is a member of a crew is one of law, and reaffirming this Court's earlier holding that since "the word 'crew' does not have an absolutely unvarying legal significance," the question whether a given employee "was or was not a member of a crew" turns on questions of fact" (p. 257), the determination of which under the Longshoremen's Act is for the Deputy Commissioner. This was the interpretation recently given to the *Cantey* case by the second circuit itself. (*See Boyce v. Shamrock Towing Co.*, C. C. A. 2, No. 131, October Term, 1943 (decided December 29, 1943).)

upon the evidence, we think it was sufficiently clear to support the Deputy Commissioner's finding that [the employee] was acting in the course of his employment. The Circuit Court of Appeals should therefore have accepted it as final" (314 U. S., at 246). (See also *Marshall* v. *Pletz*, 317 U. S. 383, 388; *Davis* v. *Department of Labor*, 317 U. S. 249, 256, 257.)

The lower federal courts have on numerous occasions held, upon the authority of the *South Chicago* case, that conclusions of a Deputy Commissioner as to questions of coverage under Section 3 (a) (1) of the Act, are determinations of fact and as such are binding upon the courts if sustained by evidence. See *e. g.*, *Puget Sound Freight Lines* v. *Marshall*, 125 F. (2d) 876 (C. C. A. 9); *Henderson* v. *Jones*, 110 F. (2d) 952 (C. C. A. 5); *Gulf Oil Corp.* v. *McManigal*, 49 F. Supp. 75 (N. D. W. Va.); *Blaske* v. *Bassett*, 35 F. Supp. 315 (E. D. Mo.); cf. *Bowen* v. *Shamrock Towing Co.*, C. C. A. 2, No. 131, October Term, 1943 (decided December 29, 1943).

The principle of the *South Chicago* case is of course not peculiar to the Longshoremen's Act. Administrative determinations under other laws have been held conclusive when supported by substantial evidence, notwithstanding that they involved a conclusion as to the coverage or application of the statute involved. This is true of such questions as whether a carrier is an "interurban

electric railway" excluded from the coverage of the Railway Labor Act (*Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 186); whether a consumer is a "consumer-producer" exempted from the Bituminous Coal Act of 1937 (*Gray* v. *Powell*, 314 U. S. 402); whether coal is "bituminous coal" (*Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381, 390, 400) and whether one carrier is directly or indirectly controlled by another so as to be excepted from the Communications Act of 1934. (*Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145–146). In each of these cases the determination as to status under the statute was dependent upon the application of an administrative judgment to substantially undisputed facts; and in each, this Court ruled that such determination, although involving the application of a statute to particular circumstances, was to be dealt with as a question of fact which the applicable statute had submitted to the judgment of the agency charged with its administration (305 U. S. at 181; 314 U. S. at 412; 310 U. S. at 400; 307 U. S. at 145). (See also *Dobson* v. *Commissioner of Internal Revenue*, Nos. 44–47, October Term, 1943 (decided December 20, 1943); *United States* v. *Louisville & Nashville R. R. Co.*, 235 U. S. 314, 320.) As a finding of fact such a determination by the administrative agency must of course have "warrant in the record" and a reasonable basis in law, but "the judicial function is exhausted when there is found

to be a rational basis for the conclusions approved by the administrative body" (*Mississippi Valley Barge Line Co.* v. *United States*, 292 U. S. 282, 286, 287; *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146; *Dobson* v. *Commissioner of Internal Revenue*, Nos. 44–47, October Term, 1943 (decided December 20, 1943)).

To deny to the conclusions of a Deputy Commissioner under the Longshoremen's Act the same finality under judicial review as this Court has accorded to like conclusions of other agencies under similar statutory patterns, would defeat the purpose of Congress in enacting the Longshoremen's Act already recognized by this Court (*Crowell* v. *Benson*, 285 U. S. at 46–47) to provide a "prompt" and "inexpensive" method for the disposal of claims.[6] For the courts to make

[6] This objective is clear from the face of the Act: compensation becomes due fourteen days after the employer has knowledge of the injury (Sec. 14 (b)). Where the right to compensation is controverted and an award is made by a Deputy Commissioner, a penalty of twenty percent is assessed for failure to pay compensation within ten days after payment is due (Sec. 14 (f)). *Candado Stevedoring Corp.* v. *Lowe*, 85 F. (2d) 119 (C. C. A. 2); *Arrow Stevedore Co.* v. *Pillsbury*, 88 F. (2d) 446 (C. C. A. 9). If the employer fails to make payment within thirty days after compensation is due, the Deputy Commissioner may enter a supplementary order directing payment, on which judgment and execution may be had in the appropriate federal district court (Sec. 18). In order that the burdens, delays, and hazards of litigation may not be used to induce employees to make disadvantageous agreements, any waiver of the right to compensation is forbidden by Congress (Sec. 15 (b)); agreements for

a new and independent judgment in each case as to the application of the general standards of the Act to the endless variety of circumstances which may arise in its administration, is to invite and to create litigation, with its inevitable delay between application for judicial review under Section 21 (b) and final disposition in the courts.[7] Certainly, in respect of the instant issue, the lower federal courts have not succeeded in evolving a rule of law sufficiently definite and certain to insure "prompt" and "inexpensive" judicial disposition, for the cases "attempt no definition of the crew of a vessel" (*Maryland Casualty Co.* v. *Lawson*, 94 F. (2d) 190, 192 (C. C. A. 5); *Diomede* v. *Lowe*, 87 F. (2d) 296, 298 (C. C. A. 2)). Nor could an absolute definition be formulated since each case involves "the complexity inherent in the multiple small facts which go to make up the ordinary situation of daily life" (Dickinson, *Administrative Justice and the Supremacy of the Law*, p. 251). In many cases in the "twilight

compensation without the approval of the Commission are prohibited (Sec. 16); and the United States attorney is directed to appear on behalf of the Deputy Commissioner and defend compensation orders (45 Stat. 490). To minimize the law's delays, the Act prescribes certain limitations on the granting of interlocutory injunctions staying the payment of compensation (Sec. 21 (b)).

[7] In the past as much as four years has elapsed during judicial review. See typical cases taken from files of United States Employees' Compensation Commission; cited in Brief for the Respondent, p. 31, in *South Chicago Coal & Dock Co.* v. *Bassett*, No. 262, October Term, 1939.

zone" there is no close precedent available to determine "upon which side of the median line the particular instance falls"; the making of such a determination therefore requires a difficult appraisal of the particular facts, and "calls for the expert, experienced judgment of those familiar" with the milieu, *Gray* v. *Powell*, 314 U. S., at 413. There can be little doubt that the questions presented to the Deputy Commissioner in cases of this kind fit within the "class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task" (*Crowell* v. *Benson*, 285 U. S. 22, 46–47). "The fact that many instances may occur where * * * application" of the statutory lines of demarcation "may be difficult is merely to emphasize the nature of the administrative problem and the reason for the grant of latitude" to the Deputy Commissioner by Congress. (Cf. *Sunshine Coal Co.* v. *Adkins*, 310 U. S., at 399.)

The court below apparently felt that these settled principles were here inapplicable because on closely similar facts it had held that a bargeman was a member of a crew and therefore entitled to maintain a libel in admiralty for maintenance and cure (*Loverich* v. *Warner Co.*, 118 F. (2d) 690). But that earlier decision did not bar a contrary view by an authorized administrative agency, where that view is sustained by evidence

and is reasonable in law. The function of a circuit court of appeals in reviewing the decision of an administrative agency is more limited than in a proceeding in which the courts are permitted to determine the question *de novo*. This is vividly illustrated by proceedings involving the status of the Chicago North Shore and Milwaukee Railroad Company. In *United States* v. *Chicago North Shore & M. R. Co.*, 288 U. S. 1, a proceeding in which the courts were not reviewing an administrative decision, this Court held the railroad to be interurban and thereby exempt from Section 20a of the Interstate Commerce Act. Subsequently, in a proceeding under the exempting proviso of the Railway Labor Act, the Interstate Commerce Commission held the same railway not to be an interurban. In reviewing this decision, the court was bound to accept the findings of the Commission if supported by substantial evidence and not contrary to law (*Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177). Accordingly the District Court and the Circuit Court of Appeals for the Seventh Circuit sustained the Commission's decision, and this Court denied certiorari, even though the result was contrary to that previously reached by this Court (*Sprague* v. *Woll*, 122 F. (2d) 128 (C. C. A. 7), certiorari denied, 314 U. S. 669).

It is no argument against the finality for which we contend, that inconsistency might thereby re-

sult between the Commissioner's findings under the Longshoremen's Act and those of a court on similar facts in cases arising under the general admiralty law (such as libels in admiralty by a seaman for maintenance and cure) or under the Jones Act, c. 250, 41 Stat. 988, 1007 (46 U. S. C., sec. 688) (making the Federal Employees' Liability Act applicable to seamen). Cf. *Davis* v. *Department of Labor,* 317 U. S. 249, 256. However, such inconsistency, in addition to being the accepted result of according finality to the findings of a trier of fact in matters which can come before the court *dehors* the statute, could certainly be no greater than that now displayed among the courts themselves. (Compare *Pere Marquette Railway Co.* v. *Bassett,* 42 F. Supp. 781 (W. D. Mich.), with *Braner* v. *Brooklyn Eastern District Terminal,* 46 F. Supp. 302 (E. D. N. Y.); see Brief for Respondent pp. 15–21 in *South Chicago Coal & Dock Co.* v. *Bassett,* No. 262, October Term, 1939; cf. *Davis* v. *Department of Labor,* 317 U. S. 249, 253, 254.) Indeed, in view of the Commissioners' expertise, "while [their] decisions may not be binding precedents for courts dealing with similar problems, uniform administration would be promoted by conforming to them where possible." Cf. *Dobson* v. *Commissioner of Internal Revenue,* Nos. 44–47, October Term, 1943 (decided December 20, 1943).

But even if the result of the principle of finality is an increased likelihood of inconsistent re-

sults on similar facts, the administrative benefits from the rule would far outweigh any such objection. Since cases are constantly arising in which a Deputy Commissioner is called upon to determine whether a claimant is a member of a crew, the decision below, if allowed to stand, will unduly burden and interfere with the orderly administration of the Act. This Court recently evaluated an expeditious remedy to employees for industrial injury against the likelihood of inconsistent results, and clearly indicated preference for the former consideration. In *Davis* v. *Department of Labor*, 317 U. S. 249, 254, involving a similar "twilight zone" between state and federal jurisdiction to award compensation to workmen employed on or near navigable waters, this Court recognized possible serious financial loss as well as loss of claim through operation of the statute of limitations while an injured employee was erroneously pursuing a remedy in the wrong tribunal, and the Court refused to require employees to "determine with certainty before bringing their actions that factual question over which courts regularly divide among themselves and within their own membership." The decision in the *Davis* case seems *a fortiori* applicable where, as in the case at bar, the conflict is not between state and federal jurisdiction, but rather between two remedial rights granted by Federal law pursuant to the same constitutional power. In view

of the liberal construction to be accorded both the Longshoremen's Act and the Jones Act (*Warner* v. *Goltra*, 293 U. S. 155, 156, 157; *Davis* v. *Department of Labor*, 317 U. S. 249, 254), it would indeed be incongruous to require an employee in the "twilight zone" between these statutes to subject his claim under either statute to risk of loss merely because he happens to institute proceedings under the statute which a court subsequently declares inapplicable. The setting aside of the Deputy Commissioner's award herein on the theory that the Longshoremen's Act and the maritime law cannot overlap and are mutually exclusive, is squarely contrary to the principle of the *Davis* case.

II

THE DEPUTY COMMISSIONER'S CONCLUSION IS REASONABLY INFERABLE FROM THE BASIC UNDISPUTED FACTS

There is no dispute in the testimony concerning Rusin's duties, and respondent has indicated his agreement with our statement of the facts. (Respondent's Answer to Pet., p. 1.) These basic facts, found by the Deputy Commissioner and accepted as final by the court below, clearly support the conclusion drawn therefrom by the Deputy Commissioner, that Rusin was a harbor worker and not a member of the crew. His duties indeed partook of the characteristics of both, but a substantial if not the major part of his functions

were those more commonly performed by a harbor worker. Thus, Rusin's duties as a bargeman for respondent consisted of the general care of the barge to which he was assigned, including such tasks as pumping out water, repairing leaks, and adjusting lines while tied up at dock. These duties, while they pertain to the care and welfare of the vessel, are those of a caretaker or watchman—classes of maritime workers included under the Longshoreman's Act (*Union Oil Co.* v. *Pillsbury*, 63 F. (2d) 925, 926 (C. C. A. 9); *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. (2d) 779, 780 (C. C. A. 2); *Diomede* v. *Lowe*, 87 F. (2d) 296, 298 (C. C. A. 2); *South Chicago Coal & Dock Co.* v. *Bassett*, 104 F. (2d) 522, 528 (C. C. A. 7); cf. *Harper* v. *Parker*, 9 F. Supp. 744, 745 (D. Md.)). Moreover, he bought his own meals and was paid by the month, pursuant to a union contract between respondent and the Harbor Boatmen's Union; Rusin was unarticled and had no experience as a seaman other than that obtained as a bargeman. He was the only person employed upon the barge at the time of his injury.

Some of Rusin's duties might be deemed navigational, such as the putting out of navigational lights and signals while in tow, the taking of lines from tugboats, and of orders from the tugboat captain. However, these duties were performed only while in tow, which was but a small fraction of the total time; and as a bargeman, Rusin was

usually subject to orders of respondent's marine superintendent, who was stationed on shore. Except for making lines fast and unfast at the docks and tightening or slackening them as necessary, he had no other duty in connection with the operation of the barge. The barge never went to sea; its operation was confined to the several rivers and tributaries within a thirty-mile radius of Philadelphia, its trips were not more than sixty miles in length; it sometimes took fifteen days between loading and discharging, but the barge was under way only a small fraction of that time (R. 8). These are significant factors. (Cf. *Schantz* v. *American Dredging Co.*, C. C. A. 3, No. 8332, October Term, 1943 (decided October 22, 1943).)* Since it is undisputed that Rusin's principal duties related to the care and welfare of the barge, the finding of the Deputy Commissioner that Rusin's navigational duties were only incidental appear justified. (Cf. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 255, 260.) Moreover, while it is true that Rusin lived, ate and slept aboard the barge—facts which indicate a "permanent" attachment to the boat, and bear on Rusin's being a "member of a crew" (*Maryland Casualty Co.* v. *Lawson*, 94 F. (2d) 190, 192

* We cite this and the other cases in this point to show that similar facts were given weight to support the conclusion that the employee there involved was or was not a longshoreman, and not to suggest that the presence of such facts precluded an opposite conclusion in other cases.

(C. C. A. 5)), such facts are not conclusive of themselves. (Cf. *Schantz* v. *American Dredging Co.*, C. C. A. 3d, No. 8332, October Term, 1943 (decided October 22, 1943); *Diomede* v. *Lowe*, 87 F. (2d) 296, 298 (C. C. A. 2); *Puget Sound Freight Lines* v. *Marshall*, 125 F. (2d) 876 (C. C. A. 9).) They are effectively counteracted in the instant case by the facts that Rusin was hired by a land foreman (*Schantz* v. *American Dredging Co., supra*) and most of the time was under the latter's command (*Lawson* v. *Maryland Casualty Co.*, 94 F. (2d) 193, 194 (C. C. A. 5); cf. *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. (2d) 245, 247 (C. C. A. 9)); that Rusin was unarticled (cf. *Henderson* v. *Jones*, 110 F. (2d) 952, 953 (C. C. A. 5); *South Chicago Coal & Dock Co.* v. *Bassett*, 104 F. (2d) 522, 527 (C. C. A. 7)); and that he had no experience as a seaman other than he had obtained as a bargeman (cf. *Schantz* v. *American Dredging Co., supra*).

Since Rusin's duties partook of the characteristics of both a harbor worker and of a member of a crew, and since the task of the Deputy Commissioner was to determine in which class Rusin belonged by virtue of the "dominant characteristics" of his employment (cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 187), there is plainly a "rational basis" in the undisputed facts for the Commissioner's conclusion. (Cf. *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 146.)

III

THE CONCLUSION OF THE DEPUTY COMMISSIONER IS NOT ONLY REASONABLE BUT ALSO CORRECT UNDER THE APPLICABLE RULES OF LAW

We believe, for reasons already stated (pp. 10–22, *supra*), that the conclusion of the Deputy Commissioner is properly to be treated as a factual question, or at least as one in which elements of fact and of expertise so preponderate as to justify the same rule of finality as is applied to findings of fact. This rule requires, of course, that the conclusion be reasonable in light of the applicable rules of law. However, if contrary to our contention, the conclusion of the Deputy Commissioner is a determination of law which the court is free to reverse unless clearly correct, we submit that the legislative history of the Act and the decisions thereunder demonstrate that the conclusion of the Deputy Commissioner not only was reasonable and has not "departed from applicable principles of law" (cf. *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, 187), but was clearly correct under these authorities. In either view, therefore, the court below improperly set aside the Deputy Commissioner's conclusion. Since the same legal materials are pertinent in either view, we treat them together.

The original purpose of the bill which upon enactment became the Longshoremen's Act was to provide workmen's compensation benefits for

those maritime workers—such as longshoremen and stevedores—who, as a result of the decisions of this Court in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *Washington* v. *Dawson & Co.*, 264 U. S. 219, were without protection under either local workmen's compensation laws or federal admiralty law (S. Rep. No. 973, 69th Cong., 1st Sess., p. 16). As reported to the Senate by its Judiciary Committee, the bill exempted from coverage "a master or seaman, as defined in section 4612 of the Revised Statutes, as amended" (S. Rep. No. 973, 69th Cong., 1st Sess., p. 2) and it was thus passed by the Senate (67 Cong. Rec. 10614). This would have excluded virtually all maritime workers.* However, in the hearings before the House Judiciary Committee, the shipowners sought to include all maritime workers under the coverage of the bill on the ground that uniformity of protection was desirable. Hearings, House Committee on the Judiciary, on S. 3170 (69th Cong., 1st Sess.) pp. 142–43, 147, 180, 185, 186, 199. The bill reported by that com-

* Section 4612 of Revised Statutes (46 U. S. C., sec. 713) provides that "every person having the command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river * * *."

mittee covered all maritime workers (H. Rep. No. 1767, 69th Cong., 2d Sess., pp. 2, 19), despite vigorous opposition from the International Seamen's Union of America, based on "the fundamental distinction between a seaman and a man working in a harbor or working on shore." Hearings, House Committee on the Judiciary, on H. R. 9498 (69th Cong., 1st Sess.) p. 104; Hearings, Subcommittee of Senate Committee on the Judiciary, on S. 3170 (69th Cong., 1st Sess.) p. 17. As a result of the seamen's opposition, the present language of the exception in Section 3 (a) (1) was introduced in the House and became law (68 Cong. Rec. 5402, 5403, 5908), allowing seamen to retain their rights under the maritime law and the Jones Act (46 U. S. C., §688).[19] *Noguera* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 136; *Warner* v. *Goltra*, 293 U. S. 155, 160; *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251, 256, 257.

In the *South Chicago* case, this Court recognized that "Congress in finally adopting the phrase 'a master or member of a crew' in making its exception, intended to leave entitled to compensation all those various sorts of longshoremen and harbor workers who were performing labor on a vessel,

[19] The phrase "master and member of the crew" rather than "seamen" was used undoubtedly because this Court had defined "seamen" for the purpose of the Jones Act to include stevedores. *International Stevedoring Co.* v. *Haverty*, 272 U. S. 50; 68 Cong. Rec. 5402–5403.

[subject to a minor exception not here relevant] and to whom state compensation statutes were inapplicable." (309 U. S., at 257.) This Court there construed the exception to cover only "employees on the vessel who are naturally and primarily on board to aid in her navigation" (p. 260), citing with approval *De Wald* v. *Baltimore & Ohio R. R. Co.*, 71 F. (2d) 810 (C. C. A. 4), certiorari denied, 293 U. S. 581; *Diomede* v. *Lowe*, 87 F. (2d) 296 (C. C. A. 2), certiorari denied, 301 U. S. 682; *Moore Dry Dock Co.* v. *Pillsbury*, 100 F. (2d) 245 (C. C. A. 9).[11] This Court's formulation of the scope of the exception, in the light of its approval of these three cases, appears to adopt the suggestion there made that Congress intended to exclude

[11] In both the *Diomede* and *De Wald* cases, the courts' refusal to hold a bargeman within the statutory exception was based upon the further ground that a single employee in charge of a boat without means of self-propulsion and unmanned except for its "Captain" could not be either a master or member of a crew. "A 'master' without men to command, without a ship to navigate, and subject to the orders of the tug captain when the scow is in tow, is a notion difficult to accept" whereas "the word 'crew' is used in the statute to connote a *company* of seamen belonging to the vessel * * *. It is the 'ship's company'" [italics added] (87 F. (2d) 296, 298). See also *Seneca Washed Gravel Corp.* v. *McManigal*, 65 F. (2d) 779 (C. C. A. 2); *Taylor* v. *McManigal*, 89 F. (2d) 583, 585 (C. C. A. 6); *Harper* v. *Parker*, 5 F. Supp. 744 (D. Md.), cited in *South Chicago Coal & Dock Co.* v. *Bassett*, 104 F. (2d) 522, 526, 528 (C. C. A. 7). If valid, this reasoning in those cases is further authority for the correctness of the Deputy Commissioner's conclusion in the instant case.

thereby from the coverage of the Act only "seafaring men" subjected to the "perils of the sea." (See Brief for Respondent in *South Chicago Coal & Dock Co.* v. *Bassett*, No. 262, October Term, 1939, p. 14.).

In view of the very narrow scope of the exception (cf. *Diomede* v. *Lowe, supra*) and the liberal construction accorded the statute in furtherance of its remedial purpose (*Nogueira* v. *N. Y., N. H. & H. R. R. Co.*, 281 U. S. 128, 136; *Warner* v. *Goltra*, 293 U. S. 155, 160), the Commissioner's conclusion in the instant case not only is eminently reasonable but also clearly correct, since the entire economic and social basis for the exception does not apply to bargemen as a class. A seaman of the type who opposed inclusion under the Act surrenders personal rights and liberties in binding himself to the vessel as a member of its crew. As such, he must obey commands given him regardless of the personal danger involved. In exchange for so binding himself he receives medical care and treatment aboard ships or in marine hospitals without expense to himself, is entitled to small payments for maintenance and cure during disability and hospitalization, and usually has an accumulation of wages at the end of a voyage (46 U. S. C. § 596, 597)—factors making it possible for him to undergo a period of disability without hardship while awaiting recovery under the Jones Act.

None of these circumstances attends bargemen. In contrast to seamen, bargemen as a class do not undergo the hardships and dangers of the high seas (cf. R. 8), nor are they subject to the requirement of absolute obedience. Moreover, since barges of the type involved in this case are exempt from documentation (46 U. S. S. §§ 332, 335) and the bulk of them are not documented (see 46 U. S. C. § 801), bargemen generally are not entitled to hospitalization or treatment at the marine hospitals, which admit only "merchant marine seamen" (24 U. S. C. § 26, 26a)—that is, seamen aboard documented vessels of the United States (42 C. F. R. § 2.21–2.46). Nor are bargemen afforded care aboard the vessel when injured, for there are neither facilities nor personnel on board to care for him, and the owner is not required to maintain a chest of medicines (cf. 46 U. S. C. § 666). Bargemen frequently live ashore and customarily go home at night, leaving their vessels unattended.[12] They are paid periodically, do not receive accumulated wages at the end of a voyage, and must meet the daily expenses of themselves and their families (cf. R. 8).

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[12] This custom has been recognized in this Court and elsewhere, and the practice has been held not to give rise to fault. *The Granite State*, 3 Wall. 310; *The Bridgeport*, 14 Wall. 116; *The Kathryn B. Guinan*, 176 Fed. 301 (C. C. A. 2); *The No. C–4*, 300 Fed. 757 (S. D. N. Y.), affirmed, 300 Fed. 761 (C. C. A. 2); *Goodwin-Gallagher Sand & Gravel Corp.* v. *Washington-Bulkley, Inc.*, 31 F. (2d) 112, 114 (E. D. N. Y.), affirmed, 31 F. (2d) 115 (C. C. A. 2).

Acceptance by Congress in the Act of the "fundamental distinction between seamen and a man working in a harbor or working on shore," implicitly recognizes that such workers, unlike seamen, require the prompt and sure relief afforded by the Act; and that they should not be required to forego the more certain if more modest benefits of that Act for a possibly greater recovery under the Jones Act (46 U. S. C. sec. 688) after the law's delays. This consideration makes the conclusion of the Deputy Commissioner in the case at bar both eminently reasonable and clearly correct.

The lower court's conclusion to the contrary is apparently based upon a misreading of the statutory exemption. While admitting that "the question concerned [the employee's] actual duties," the court held that "where such duties pertain to the welfare and operation of the vessel, the employee is a seaman and, as such, is the master or member of the crew of the vessel, as the case may be" (R. 17).[13] This phrasing of the scope of the exception not only departs from

[13] The use in the instant case of this phrase, which may be traced to Article 10 of Treasury Regulations 91 (promulgated under Title VIII of the Social Security Act), was undoubtedly the result of the fact that the court was simultaneously considering whether wages paid bargees were exempt from payment of Social Security tax under Section 811 (b) (5) of the Social Security Law (49 Stat. 639; 53 Stat. 1400, 42 U. S. C. 1011 (b) (5)), exempting wages paid for "service performed as an officer or member of the crew of a vessel documented under the law of the United States".

the criterion established in the *South Chicago* case, but by encompassing within the exception maritime workers other than "seafaring men," it conflicts with the broad remedial purposes of the Act to legislate comprehensively for all maritime workers, subject to the narrow exceptions provided therein.

Moreover, the lower court in reversing the conclusion of the Deputy Commissioner relied very heavily on its earlier decision in *Lovcrich* v. *Warner Co.*, 118 F. (2d) 690, certiorari denied, 313 U. S. 577, involving the respondent in the

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Berwind-White Coal Mining Co. v. *Rothensies*, 137 F. (2d) 60 (C. C. A. 3). Article 10 of Treasury Regulations 91 deals with this exemption, and provides that the exemption applies to "every individual * * * serving on board the vessel and contributing in any way to the operation and welfare of the vessel." Congress' intention in inserting this exemption was apparently to exempt migratory workers because of the difficulty of administration and identification. Since the reasons behind the exceptions are totally different, the court below improperly utilized precedents under the Social Security Act to support its conclusion under the Longshoremen's Act. *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. at 259. Moreover, it is clear from these regulations that the phrase was intended to include only those members of the ship's company, such as cooks, clerks, stewards, and mess attendants, whose duties while not directly related to navigation of the vessel are rather in the service of those who participate in navigation. The exemption under the Longshoremen's Act has already been so construed. *A. L. Mechling Barge Line* v. *Bassett*, 119 F. (2d) 995 (C. C. A. 7). In any case, the Bureau of Internal Revenue—the administrative agency which promulgated and interprets these regulations—had ruled that under the regulations bargemen similar to Rusin were not within the exception of "officer or member of the crew." (S. S. T. 366, 1939-1 (Part 1) Cum. Bul. 300.)

instant case. That case involved a suit brought by the injured employee in 1939 for indemnity and maintenance and cure under general admiralty law, on account of an injury occurring in 1926. Since it seems clear from the entire structure of the Longshoremen's Act (enacted in 1927) that it was not intended to supersede liability under general admiralty law accruing from past injuries, the decision of the court below that the employee was excluded from the Act because a member of a crew was wholly unnecessary to its decision there.[1] Further, the court based its ruling on the facts that the employee was "a licensed junior engineer and water tender and qualified as an able seaman and barge master, 2nd mate and 3rd mate" (118 F. (2d) at 694). These facts bear upon the employee's attainments, and not upon his actual duties—the true criterion.[2] (See *South Chicago*

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[1] The district court in the *Loverich* case had dismissed the indemnity claim on the ground of laches, but held that since defendant's failure to provide maintenance and cure was a continuing breach of his obligation, the employee's right to recover therefor for the six years prior to suit was not barred by laches. The question as to the employee's rights under the Longshoremen's Act was raised for the first time upon appeal to the circuit court, where it was claimed *inter alia* that the right to maintenance and cure arising after 1927 had been superseded by the Longshoremen's Act, which provided an exclusive remedy. The court below held that the injured employee was within the exception to the Longshoremen's Act, and therefore that his rights to maintenance and cure were unaffected by it.

[2] There is no reference to the employee's actual duties either in the opinions or in the briefs filed by defendant.

Coal & Dock Co. v. *Bassett*, 309 U. S. at 260.) Clearly, therefore, the decision in the *Loverich* case does not require reversal in the Deputy Commissioner's finding. Moreover, insofar as the Deputy Commissioner's conclusion need only be reasonable in light of applicable rules of law, the difference in the nature and theory of the suits deprives the lower court's reliance on the *Loverich* case of all validity, since the latter case involved the review by the circuit court of a decision made in the first instance by the district court—a function involving much broader powers of scrutiny than review of a conclusion of a Deputy Commissioner. See pp. 18–19, *supra*.

CONCLUSION

The judgement below is erroneous and should be reversed.

Respectfully submitted.

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JANUARY 1944.

APPENDIX

The pertinent provisions of Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C. § 901 *et seq.*) are as follows:

DEFINITIONS

SEC. 2 [33 U. S. C. § 902]. When used in this Act—

* * *

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

COVERAGE

SEC. 3 [33 U. S. C. § 903]. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; * * *

PROCEDURE IN RESPECT OF CLAIMS

SEC. 19 [33 U. S. C. § 919]. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

REVIEW OF COMPENSATION ORDERS

SEC. 21 [33 U. S. C. § 921]. * * *

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the district court of the United States for the District of Columbia if the injury occurred in the District). * * *

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IN THE

Supreme Court of the United States

October Term, 1943.

No. 362.

AUGUSTUS P. NORTON, Deputy Commissioner for the Third Compensation District,

Petitioner,

v.

WARNER COMPANY.

Answer to Petition for Writ of Certiorari.

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IN THE

Supreme Court of the United States

No. 362. October Term, 1943.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT,

Petitioner,

v.

WARNER COMPANY.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

QUESTION PRESENTED.

Whether the finding of the Deputy Commissioner that a bargeman is not "a master or member of a crew" within the exclusionary provisions of Section 3 (a)-(1) of the Longshoremen's & Harborworkers' Compensation Act (c. 509, 44 Stat. 1424, 33 U. S. C. sec. 903 (a) (1)) is conclusive where the basic facts competently found by the Commissioner rightly call for a different conclusion.

STATEMENT OF THE FACTS.

The Respondent, Warner Company, agrees with the statement of the Petitioner. It is desired only to point out that the claimant bargeman, Rusin, did not load or unload or handle or supervise in any manner or at any time any cargo aboard his barge and had no duties in connection therewith except those of any master responsible for the

safeguarding of his vessel in navigation. At the time of the accident occasioned by the slipping of the capstan bar, there was no cargo aboard the Barge No. 59. It should be further pointed out that the Barge No. 59 and Rusin were not engaged solely in transportation within Philadelphia harbor and vicinity, but serviced rivers and tributaries within the states of Pennsylvania, New Jersey and Delaware throughout the thirty mile radius in all directions from Philadelphia as noted by the Commissioner.

ARGUMENT.

Counsel for the Respondent, Warner Company, find themselves herein in the position of making an argument exactly contrary to that unsuccessfully urged by them as Petitioners in *Loverich v. Warner Company*, 118 F. 2d 690 (CCA 3rd, March 17, 1941,) certiorari denied 313 U. S. 577, "whose facts as to the employee's duties and services aboard the barge are indistinguishable from the facts of the instant case". *Warner Company v. Norton and Rusin*, 137 F. 2d 57, 59 (CCA 3d, June 17, 1943). The *Loverich* case is not only "on all fours" with the within *Rusin* case, but concerns the same employer, the same employment, the same locale, the same working conditions and the same liabilities.

The argument of the Warner Company that *Loverich* was a harborworker under the jurisdiction of the Longshoremen's Act was rejected two years ago by the Third Circuit Court of Appeals and your Honorable Court thereafter denied its petition for certiorari. The within Petitioner in the *Rusin* case can only be classified and treated likewise; there has been no change in the law or the decisions in the interval.

Petitioner urges as the primary reason for granting its prayer for writ of certiorari that "the lower court failed to give proper effect to the decision of the court in *South Chicago Coal & Dock Company v. Bassett*, 309 U. S. 251". (Petition Page 7.) It certainly cannot be urged that the *South Chicago* decision was not examined in detail since it was expressly distinguished in the *Loverich* case and was cited five times in the *Rusin* case and three times by the same lower court in a companion decision handed down on

the same day, June 17, 1943, *Berwind-White Coal Mining Company v. Rothensies*, 137 F. 2d 60.

It is not challenged by the Petitioner that the decisions in *Lovérich v. Warner* and *Rusin v. Warner* are entirely consistent with each other. It is respectfully submitted by the Respondent that both these Warner Company cases are also consistent with the *South Chicago* case and that, moreover, there is no federal question of any substance here involved.

Petitioner now argues that the findings of the Longshoremen's Commissioner claiming jurisdiction are findings of fact and as such not subject to review, that if they are findings of law they are not consistent with the decided cases other than *Loverich*, and finally that administrative expedition requires upholding the Commissioner's judgment, even if it results in a "shadowy area". The Third Circuit Court of Appeals anticipated and answered all these attempts of the Petitioner, which will be considered in the same order.

1. There was no conflicting testimony before the Longshoremen's Commissioner as to the character of the duties of Rusin. The Commissioner simply adopted the undisputed facts in the case and then jumped to the conclusion that Rusin was a harborworker. There has not been any argument as to the basic facts or as to any implications of fact to be drawn from the testimony. The sole question has been as to the conclusion.

Frequently in other cases there have been questions of fact which had to be determined before the presentation of the legal issue of jurisdiction, and in the determination of such facts, the issue of jurisdiction has become

entirely clear. It is not disputed that the Commissioner alone should resolve finally the contradictions of testimony and that such findings of fact should be the basis for findings of law. The cases cited by the Petitioner all stand for this primary principle, but must all be examined on their own peculiar facts.

In the *South Chicago* case, supra, it was found as a fact that the claimant was a mere watcher of a coal chute who slept on deck while the vessel was underway and who had no duties in connection with the two to three hour trips which were entirely for the fueling of harbor craft. In *Nogueira v. New York, New Haven & Hartford Railroad Company*, 281 U. S. 128 (1930), he was a stevedore. In *Seneca Washed Gravel Corp. v. McManigal*, 65 F. 2d 779 (CCA 2d 1933), he was a night watchman. In *DeWald v. B. & O. Railroad Company*, 71 F. 2d 810 (1934), certiorari denied 293 U. S. 581, he was a cargo watcher and freight handler. In *Diomede v. Lowe*, 14 F. Supp. 380, 87 F. 2d 296, certiorari denied 301 U. S. 682 (1937), he was again primarily concerned with the loading and discharging of the cargo of a dump scow. In *Parker v. Motor Sales*, 314 U. S. 244 (1941), the claimant was an outboard motor salesman and the only question was whether the accident happened in the course of employment. In *Davis v. Department of Labor and Industry*, 317 U. S. 249 (December 14, 1942), the claimant was cutting steel into lengths and there was no evidence of any barge operational duties.

The only identical twins in the jurisdictional decisions are the cases of *Loverich v. Warner* and *Rusin v. Warner*. There is however a consistent thread running through all the cases construing this exemptive clause of the Longshoremen's Act, which principle was well set forth by your

Honorable Court in the *South Chicago* case as follows (Pp. 257, 260):

> "The question is whether the decedent in this instance fell within that class . . . of longshoremen and harborworkers who were performing labor on a vessel. . . . The question concerns his actual duties. . . . these duties did not pertain to navigation".

While your Honorable Court found in the *South Chicago* case that the claimant was not a "master or member of the crew" because his duties were those of a laborer rather than a seaman, and that the Commissioner's finding must be sustained, it was noted that this would be so only "if there was evidence to support it". (Page 258.)

2. The Lower Court herein (page 58) repeated and applied the principle that "we necessarily take as conclusive the facts as found by the Commissioner". The Lower Court denied only that it need accept the "Commissioner's conclusion . . . if the basic facts competently found by the Commissioner rightly call for a different conclusion". The position of the Lower Court is clear that where the basic facts competently found demand another conclusion, the question is one of law for appellate correction.

The fact findings of the Commissioner herein have never been disputed and it is not bandying words to insist that the whole course of this litigation has been concerned with the legal issue of sufficiency of evidence. Certainly appellate courts are not deprived of the right to review where there is no evidence of the conclusion of jurisdiction, or, conversely, the evidence only permits of another conclusion.

Petitioner would not presumably follow his argument to the logical reduction that there should be no appeal from

a Commissioner's conclusion that the sum was five if the parts were two and two.

It has never been claimed herein that Rusin was a freight handler or a cargo watcher. It is apparently nevertheless argued that his legal status was not that of one engaged in vessel operations because his type of vessel allegedly needs no operator whatsoever. Attempt is made to classify him as something less than a master or member of the crew because he did not control the course of his vessel.

It is respectfully submitted that these attempts to determine jurisdiction on mathematical, geographical or horsepower basis must fail when construing an Act of Congress as clear as this one. Are we to separate the beneficiaries of the Longshoremen's Act from the wards of admiralty on the one hand and the recipients of state compensation on the other hand because sometimes there are two men rather than one man aboard; because sometimes the vessel goes ten miles at sea and sometimes goes sixty miles on the Delaware River; because sometimes the vessel has an outboard motor instead of an attending tug?

The question herein is one of law. There was no evidence—let alone a sufficiency—to deprive the claimant of the status of a master or member of the crew. He functioned as a seaman and would not have been more of a seaman if he had a companion, or if he had gone a few miles further.

In *Davis v. Department of Labor and Industry*, supra, your Honorable Court did not hesitate to disregard the findings of four lower tribunals when a different legal conclusion as to jurisdiction was indicated.

3. Finally the Petitioner has resorted to one of those public policy arguments, which are themselves in the shadowy area which Petitioner apparently thinks would be an inevitable result of the expeditious administration of the Longshoremen's Act. It is urged that there must be no appeal, whether the question be of fact or of law, so that there may be quick payment to beneficiaries.

The only purported authority for such economic argument is the recent case of *Davis v. Department of Labor and Industry*, supra. The end-result of that decision, of course, is directly contrary to the prayer of the Petitioner herein since there the decisions of all four lower tribunals are reversed. More important even, the *Davis* case is concerned with the twilight zone between Federal and State jurisdiction. There is no attempt therein to argue or decide that the claimant, measuring steel in dismantling a bridge, was a master or member of the crew. The exemptive clause was not in question.

When the Petitioner extends the argument by stating that the within decision as it now stands would deprive the bargeman of his last resort, there is complete misunderstanding. The bargeman who is a master or member of the crew has resort to admiralty jurisdiction and is generally entitled to maintenance and cure, and the best example thereof is *Loverich v. Warner*, supra. Because there are cases where there may be no recovery in admiralty because the facts do not contain a cause of action, does not justify the untrue statement that there is no alternative right or remedy for this exemptive class. These bargemen have the same maritime benefits, public health service, wage protection, etc. as any other seamen.

No one word is going to resolve all the difficulties of demarking this exemption, but it is respectfully submitted that all the decisions of your Honorable Court and the various Circuits have turned and properly should turn on the question of whether the claimant was engaged in helping in the operation of the boat. (We use "operation" instead of "navigation" for fear of continuing the technical fallacy of the Petitioner in arguing that "navigation" means controlling the course of the vessel.) It is respectfully submitted that this general formula set up by the courts is an eminently practical guide for administration by Longshoremen's Commissioner. To be sure it will not eliminate all litigation, but, more important, it will not make the Commissioners' decisions the arbitrary absolute they might otherwise become.

WHEREFORE it is respectfully submitted that there is no conflict between the within decision of the Third Circuit Court of Appeals and the decision of other Circuits, and there is no conflict with any of the applicable decisions of your Honorable Court, and that the within petition should be denied.

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Counsel for Respondent.

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IN THE

Supreme Court of the United States

October Term, 1943.

No. 362.

AUGUSTUS P. NORTON, Deputy Commissioner for the Third Compensation District,

Petitioner,

v.

WARNER COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1943. No. 362.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT,

Petitioner,

v.

WARNER COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 6-12) is reported in 45 F. Supp. 835. The opinion of the Circuit Court of Appeals for the Third Circuit (R. 14-18) is reported in 137 F. (2d) 57.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered June 17, 1943 (R. 18). The petition for certiorari was filed September 17, 1943, and was granted November 8, 1943 (R. 20). The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

COUNTER-STATEMENT OF THE CASE.

This is a claim under the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424 (33 U. S. C. Chap. 18, Sec. 901 et seq.), for injury sustained by Nicholas Rusin aboard Warner Barge No. 59, owned and operated by the respondent-employer, Warner Company, while the claimant was engaged in turning the capstan to bring his unloaded barge upstream and alongside a pier in the Schuylkill River. Answer was filed admitting the disability, but denying that there was any jurisdiction, as the claimant was within the exempt class of "master or member of a crew of any vessel" under Section 3 (a) (1) of the Longshoremen's Act.

The Deputy Commissioner found as a fact that "the vessel on which he (Rusin) was injured had no motive power of its own; that the movement of the barge was confined within about 30 miles; that he was the only person employed aboard the barge" (R. 7). The Deputy Commissioner therefore concluded that Rusin had no other duty in connection with the vessel's operation than handling lines and was not "a master or member of the crew of any vessel". The Deputy Commissioner ignored the admitted fact that Rusin had no duties with respect to the cargo and was continually on watch under way (R. 4, 5).

The respondent-employer is a Delaware corporation engaged in the production and sale of sand and gravel, maintaining and operating a considerable fleet of dredges, barges and tugs upon the Schuylkill, Delaware, Christiana, Cooper and Rancocas Rivers within a sixty mile circumference extending from about Trenton, New Jersey, on the north to Wilmington, Delaware, on the south. The main plant of the Warner Company is at Morrisville, Pennsyl-

vania, which is on the Delaware River, just south of Trenton, and the chief distribution points are at Philadelphia on the Delaware and at Wilmington on the Christiana River. It was the usual practice to load barges and tow them in flotillas to a convenient distribution point, there to await orders which might be weeks later.

The statement of facts contained in the opinion of the District Court and again in the Circuit Court of Appeals is complete and acceptable to the respondent. There has been at no time any conflict as to the facts.

In the hope that a restatement may re-emphasize the character of Rusin's employment and duties, as one who had permanent connection with and participated in the operation of his vessel under way and at all times, counsel submits the following outline of the transcript:

1. Rusin described himself simply as a "boatman" (T. p. 2),
2. who was hired as "an experienced seaman" in May, 1936, and worked continuously for the twenty months to his injury on March 11, 1938 (T. pp. 3, 7) on
3. the Warner Company Barge No. 59 which was non-self-propelled and without steering equipment, of 273 gross tons, documented with official No. 170340, and was usually towed in flotilla formation (T. pp. 5, 15).
4. Rusin lived alone, sleeping and eating on his barge, which had complete living quarters (T. pp. 2, 3, 8).
5. He was a member of the National Boatmen's Union and was paid by the month (T. pp. 2, 8).

6. Rusin's Barge No. 59 was navigated out of Philadelphia, Pennsylvania, throughout a sixty mile circumference, including Wilmington, Delaware, on the south, Morrisville, Pennsylvania, on the north and the Delaware and Schuylkill Rivers, Cooper's Creek, Christiana River and various tributaries in Pennsylvania, New Jersey and Delaware. The Barge No. 59 was away from its loading dock for weeks at a time (T. pp. 2, 8).

7. When under way Rusin was under the "authority of the captain of the tugboat to demand", but had charge of the operation under way of a number of vessels in the flotilla (T. p. 5).

8. Rusin responded to the tug signals and performed all necessary duties in connection with the operation of his vessel, which included (T. p. 4)

9. making fast, requisitioning, slacking and adjusting lines to dock and other vessels (T. p. 4),

10. sounding and reporting leaks; pumping (T. p. 4),

11. putting out and caring for navigation lights under way (T. p. 4).

12. He had no duties whatsoever in connection with the handling of cargo and had no shore duties (T. p. 5).

13. Rusin was injured when he was on watch on his barge afloat on the Schuylkill River, turning the capstan to bring his boat alongside the pier by taking up a moored line (T. p. 3).

STATUTE INVOLVED.

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424 (33 U. S. C., Chap. 18) provides inter alia as follows:

"Sec. 2. Definitions.

(3) The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States."

"Sec. 3. Coverage.

(a) Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any drydock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of disability or death of—(1) a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net."

"Sec. 5. Exclusiveness of Liability.

The liability of an employer prescribed in section 4 of this chapter shall be exclusive and in place of all other liability of such employer to the employee. . . ."

QUESTION PRESENTED.

Whether the finding of the Deputy Commissioner that a bargeman is not "a master or member of a crew" within the exclusionary provisions of Section 3 (a) (1) of the Longshoremen's and Harbor Workers' Compensation Act, c. 509, 44 Stat. 1424 (33 U. S. C. sec. 903 (a) (1)) is conclusive where the basic facts competently found by the Commissioner rightly call for a different conclusion.

SUMMARY OF ARGUMENT.

I. Although the findings of fact by the Deputy Commissioner are conclusive, it remains the duty of the appellate courts to determine that his conclusions of law are supported by substantial evidence. The facts herein are admitted and the only question is as to their sufficiency. It is maintained that there is no evidence of any cargo or shore duties by Bargeman Rusin and no inference can be drawn, simply from the humble nature of his duties, to the effect that Rusin was not a master or member of the crew.

II. A bargeman, like any other employee on navigable waters, may or may not be a master or member of the crew. It is always a question of his duties under the circumstances and the Deputy Commissioner was wrong in finding Rusin not exempt merely because he was alone on a wheelless non-self-propelled barge.

III. Each employee should be classified by analyzing his duties as they pertain to navigation, using that term in the broad sense to include all who further the purpose of the vessel. Even if we limit "navigation" to include only those whose primary concern is the passage of the boat

through the water, Rusin's duties were exclusively navigational.

IV. The petitioner concedes that Rusin's duties pertained entirely to navigation while in tow, and that similar inference might be drawn as to the character of his duties at all times, but the petitioner argues that this makes no difference because the appellate courts have a limited jurisdiction over cases arising under the Longshoremen's and Harbor Workers' Act. The petitioner concedes that such a principle makes for inconsistency from the same court on the same facts, but advances the superior argument of finality. It is denied that expedition requires wrong conclusions or absolute dictators in administrative bodies. It is denied that inconsistent decisions by the same court under the Jones Act and under the Longshoremen's Act will facilitate even finality.

V. The conclusion of the Circuit Court that Rusin was a master or member of the crew and hence exempt, on the basic facts found by the Deputy Commissioner, should be confirmed.

ARGUMENT.

I. It Is the Duty of the Appellate Courts to Ascertain Whether the Jurisdictional Finding of the Deputy Commissioner Is Supported by the Substantial Weight of the Evidence.

The petitioner and respondent are agreed upon the facts in this case, which were not disputed even before the Longshoremen's Commissioner. Respondent disagrees only with petitioner's characterization of Rusin's duties as those of a harbor worker because some of them could have been performed by local mechanics. The District Court and the Circuit Court of Appeals below are agreed that the facts as found by the Longshoremen's Commissioner are conclusive, and no attempt is made by counsel to dispute that fundamental principle as established in a series of cases terminating with *South Chicago Coal & Dock Co. v. Bassett*, 104 F. (2d) 522, 309 U. S. 251. The Third Circuit Court of Appeals has laid down only the corollary principle that "a Commissioner's conclusion that one is or is not 'a master or member of a crew' is not binding upon a reviewing court, if the basic facts competently found by the Commissioner rightly call for a different conclusion". It is respectfully submitted that this extender is equally sound and precedented.

This is no more than was said by this Court in *South Chicago Coal & Dock Co. v. Bassett*, 309 U. S. 251, 253, 258, in approving the Circuit Court action therein:—

> "The court of appeals found that . . . the District Court was precluded from weighing the evidence, being required to examine the record and ascertain whether there was any evidence to support the com-

missioner's finding. . . . *It was the duty of the District Court to ascertain whether it was so supported.*" (Italics ours.)

Crowell v. Benson, 285 U. S. 22, determined the constitutionality of the Longshoremen's Act generally and first attempted to define the boundaries of the deputy commissioner's responsibilities. Petitioner has referred to this case as supporting his argument that the question of exemption is one of fact to be expertly and finally determined by the deputy commissioner. When the language of this Court is read in its context, however, there is basis only for the opposite conclusion.

It was disputed therein whether the relationship of master and servant existed; the commissioner found it did; the district court took testimony *de novo* and found it did not; the circuit court and this court sustained the district court. The large question before the court was the right of trial *de novo* in the district court. In all events, however, this court was agreed upon the right of judicial review (page 54):—

"The act itself, where it applies, establishes the measure of the employer's liability, thus leaving open for determination the questions of fact as to the circumstances, nature, extent and consequences of the injuries. . . . Findings of fact by the deputy commissioner upon such questions are closely analogous to the findings of the amount of damages that are made, according to familiar practice, by commissioners . . . or assessors; and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases. . . . A different question is presented where the determinations of fact are fundametal or

> 'jurisdictional' in the sense that their existence is a condition precedent to the operation of the statutory scheme."

In *Crowell v. Benson*, this court distinguished the procedure to govern proof of the facts of injury as opposed to the facts of jurisdiction and it is submitted the facts relating to exemption partake of the nature of jurisdictional facts. This conclusion is independent of the right to *de novo* hearing.

It is in order to note that this court, while recognizing from the beginning the desirability of finality, issued a warning against unrestricted power in the deputy commissioner (page 57):—

> "The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect, finality in law."

In his dissenting opinion in *Crowell v. Benson*, Mr. Justice Brandeis concerned himself with the denial of the requirement of a *de novo* hearing before the district court in jurisdictional matters, but he too recognized the judicial function to review the record (page 88):—

> "The proceedings of the deputy commissioners are endowed with every substantial safeguard of a judicial hearing. Their conclusions are, as a matter of right, open to reexamination in the courts on all questions of law; and, we assume for the purposes of this discussion, may be open even on all questions of the weight of the evidence."

The petitioner gives lip service to the doctrine that there must be substantial evidence to support the Referee. On page 15 of petitioner's brief it is stated: "As a finding of fact such a determination by the administrative agency *must of course* have 'warrant in the record' and a reasonable basis in law."

In the petition for certiorari, and now in the brief presented by petitioner, however, it has been urged in effect that the conclusions of law of the Commissioner relating to jurisdiction are as binding as his findings of fact. The petitioner concedes there must be substantial evidence to support the non-application of the exemptive provision, but then goes on to argue that anything which the Commissioner decides must be accepted. Presumably the petitioner would not follow this argument to the logical conclusion that there should be no appeal from a Commissioner's conclusion that the sum was five where the parts were two and two. Petitioner would thus deny even the right to appeal from a Commissioner's conclusions where there was no scintilla of evidence to support them. It would be similar to a denial of a right of appeal from a jury verdict where the trial judge should not have allowed the case to go to the jury for want of evidence.

It is respectfully submitted that this Court, in support of the proposition that the findings of fact of the Commis-

sioner must not be disturbed, never intended to make the Longshoremen's Commissioner an absolute dictator over the jurisdictional disputes before him. In the case of *Davis v. Department of Labor*, 317 U. S. 249 (December 14, 1942), this Court did not hesitate to disregard the findings of four lower tribunals when a different legal conclusion as to jurisdiction was indicated.

It is interesting to note that in the much cited case of *Diomede v. Lowe*, 87 F. (2d) 296, certiorari denied 301 U. S. 682, the finding of the Deputy Commissioner of no jurisdiction because the bargeman was a master or member of the crew, was set aside.

If it be seriously urged by petitioner that there is herein substantial evidence that claimant was a harbor worker as opposed to a master or member of the crew, it must further be argued by the petitioner that every employee aboard a non-self-powered wheelless vessel is a harbor worker. This proposition is an unrealistic and discredited attempt at simplification and will be denied until Congressional amendment is made. *Cf. Cantey v. McLain Line, Inc.*, 32 F. Supp. 1023; 114 F. (2d) 1017; 312 U. S. 667, *Bowen v. Shamrock Towing Co.*, CCA 2, No. 131, Oct. Term, 1943 (decided Dec. 29, 1943). Admittedly, the determination of disputed facts is for the Commissioner and, further, there may be a twilight zone where the Commissioner must draw inferences, but where, as here, there are no non-maritime, harbor or cargo duties, the Commissioner cannot be permitted without recourse to call the employee a harbor worker.

Petitioner concedes that "a substantial if not the major part of his (Rusin's) functions were those more commonly performed by a harbor worker" (Brief p. 22). It is even

admitted that Rusin's duties under way were entirely navigational, but it is attempted to negative that by averring: "These duties were performed only while in tow" (Brief p. 23). Pumping, repairing leaks, and adjusting lines are improperly called the duties of a harbor worker. Even conceding that they may be performed by a harbor worker on occasion, that did not make Rusin a harbor worker because he performed them. Rusin's occupation was a continuous one; this is not the case of a member of a crew who signed off and became a watchman in port. He was on twenty-four hour duty and generally en route with a full cargo, if not at all times under way. The classification of the employee does not change because the vessel is moored. *Bowen v. Shamrock Towing Co.* (2d CCA, December 29, 1943).

The argument of the petitioner goes so far that, if adopted, all members of a tug crew would be harbor workers because they have these same humble maritime duties of providing for the safety of the vessel. Undoubtedly certain jobs aboard a vessel are similar to those in an office building, but the employment character of the doer is fixed by his relationship to his vessel.

II. The Legislative Exemption of "Master or Member of a Crew of Any Vessel" Should Not Be Judicially Limited by Etymological, Geographical, Physical or Economic Rules of Thumb.

This principle should not be a matter of argument as all hands recognize the *South Chicago* statement that: "The word 'crew' does not have an unvarying legal significance." Petitioner has, however, construed this to mean that there is no rule of law whatsoever controlling the Com-

missioner, and that in any event the Commissioner can draw sufficient inferences from the physical surroundings of the employment.

Granting that it is desirable to expedite decisions and payments in cases of this character and that it would save mental turmoil to find a mathematical formula which could be applied so that each case showed white or black, there is no such practical procedure which accomplishes even substantial justice. This is not an unusual hardship which must be over-ridden for administrative purposes, especially since, percentage-wise, there are few of these jurisdictional disputes.

It is difficult, and not too helpful to attempt, to find any completely consistent thread running through the lower court decisions dealing with this question of exemptive jurisdiction. The varying duties of the bargemen in each case must be analyzed and the logic of the decisions is frequently distorted. It appears fanciful to counsel to argue from the etymology of the exemptive words, as some courts have done in denying exemption to a solitary bargeman, that he cannot be a master without a crew and cannot be a crew because that is a collective noun. Equally irrational in application is the attempt to make the exemption depend on whether a vessel's operations are confined within the limits of a harbor, since harbors are very different in extent and character. It has been similarly argued that there can be no exemption simply because there is no engine or no wheel, although a barge of the character here involved is a larger and more seaworthy craft than many vessels with both wheel and power. The petitioner herein has for the first time urged that the exemption be denied because frequently the economic status of a bargeman differs from

that of an offshore seaman in that the latter may be forced to accumulate his pay during a voyage and may enjoy certain hospital services. The distorted emphasis of the petitioner on the fact that Rusin took some orders from a port captain stationed on land and on the fact that Rusin's boat was more often awaiting tow than under way, illustrates this same wrong emphasis on irrelevant factors.

The determining factor of jurisdiction should be the character of the employee's duties at the time of his injury. The Commissioner and the courts should apply the rule of "duties under the circumstances" and not just emphasize isolated criteria. In determining the duties it will be necessary to consider all the incidents of his general employment, but only as they relate to his specific job at the moment, and not as absolute denominators.

To allow any one factor to be conclusive would make for incongruous results. If the number of men aboard the boat constitutes the final test, then a seagoing solitary bargee would be under the Longshoremen's Act, whereas, if he had a cabin mate on the same boat, under the same conditions, he would be under the admiralty jurisdiction. If the test is the harbor's limits, then we would find no exemption for seamen on thirty mile trips as in New York Harbor, but a contrary result on a cross-river towage of a few miles. It might even be urged that a different rule applies if a bargeman be thrifty or impecunious. The obvious incongruities arise because the duties of a seaman are not reflected necessarily by the physical character of his vessel.

It is respectfully submitted that this Court indicated dismissal of such rules of thumb as proper criteria for jurisdiction by the decision in *Cantey v. McLain Line, Inc.*,

32 F. Supp. 1023; 114 F. (2d) 1017; 312 U. S. 667, where an admiralty action was remanded for trial after the District and Circuit Courts had dismissed the cause of action of a bargeman who was the sole employee of a non-self-propelled wheelless scow. The lower courts had followed *Diomede v. Lowe*, 87 F. (2d) 296, CCA 2nd, certiorari denied 301 U. S. 682, and *DeWald v. B. & O. Railroad Company*, 71 F. (2d) 810, CCA 4th, certiorari denied 293 U. S. 581, into the blind alley of conclusion which results from automatic denial that such a bargeman can be a master or member of a crew.

Petitioner purports to find comfort for his theory of "overlapping" jurisdictions from *Cantey v. McLain Line Inc.*, 312 U. S. 667, and also from the recent decision of *Bowen v. Shamrock Towing Co.*, (2d CCA December 29, 1943). Both of these cases were under the Jones Act, both arose in the Second Circuit, and in both the District Court dismissed for lack of jurisdiction on the precedent of *Diomede v. Lowe*, which also was decided by the Second Circuit Court of Appeals. Both cases were remanded for trial. *Bowen v. Shamrock*, far from being an extension of liability on the part of the shipowner, was recognized by the Second Circuit Court as a limitation on *Diomede v. Lowe*, arising out of the *McLain* decision by this Court. No longer does the fact of solitariness aboard a wheelless barge prevent a man from being master or member of a crew. Certainly the rules of classification are varying and elastic, which is not, however, to say that rules do not exist.

III. A Master or Member of a Crew Is One Whose Duties Pertain to Navigation, Assisting in the Operation of His Vessel Under Way and at All Times.

In attempting to be practical and expeditious, there can be a tendency in jurisdictional cases to be infatuated with words. Defining definitions is unproductive and it may well be that the term "master or member of a crew of any vessel" is itself sufficiently fundamental. In the *South Chicago* case this Court characterized the claimant therein as non-exempt because his "duties did not pertain to navigation". That judicial interpretation of legislative language appeals as being as simple and as effective as it is possible to be in cases where the line of demarcation depends on the circumstances. It is respectfully submitted that, in the interpretation of the exemptive provisions of the Longshoremen's Act, the only question should be whether the duties of the claimant pertain to navigation, thus qualifying him as a master or member of a crew of any vessel.

In *South Chicago v. Bassett,* this Court adopted the view of Judge Hough in *The Buena Ventura*, 243 F. 797, 799, where he considered any one who served the ship in her navigation was a member of the crew. A number of the lower courts have recently adopted this "navigation" test. Although the facts in *Puget Sound Freight Lines v. Marshall,* 125 F. (2d) 876, 879 (CCA 9th, February 19, 1942) are exactly opposite, in that the claimant was described as a "traveling stevedore", the case is typical in pointing out that: "The distinction between a longshoreman and a crew member seems to hinge upon whether or not the employee is 'naturally and primarily on board to aid in her navigation' ".

In the Seventh Circuit, in *A. L. Mechling Barge Line v. Bassett*, 119 F. (2d) 995, 998 (May 16, 1941) the court held a cook to be a member of the crew and said:—

> "A reading of the cases makes it rather plain, that while numerous facts have been taken into consideration in distinguishing between a longshoreman and a member of the crew, the fundamental distinction, generally recognized, has been whether the employee was permanently attached to a ship engaged in navigation."

In the First Circuit, *Carumbo v. Cape Cod SS. Co.*, 123 F. (2d) 991, 995 (Dec. 3, 1941) the court defined a member of the crew within the exemptive clause, as follows:—

> "The requirements that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation appear to us to be the essential and decisive elements of the definition of a 'member of a crew'."

In the Fifth Circuit, the court in *Henderson v. Glens Falls Indemnity Co.*, 134 F. (2d) 320, 322 (March 12, 1943), certiorari denied 319 U. S. 756, recognized that a "bargeman" of a one-man barge may be within the scope of the Longshoremen's Act. The court said:—

> "It is well settled by the authorities that a bargeman may be or may not be, within the exclusion from the Compensation Act, 33 U. S. C. A. Sec. 902 (3), a member of the crew of a vessel according to the facts of the particular case."

The District Court herein recognized the validity of the "navigation test", but missed the point in holding that the claimant's duties did not pertain to navigation because

"Rusin as bargemaster could not set his own course or control or change it at any time". (Record p. 8) Any such definition of navigation is too limited, as is immediately evident when it is realized that this would eliminate all employees on all craft which had to be towed and practically all other seamen on a steamship except the licensed personnel and quartermaster. Navigation is not limited to putting over the helm; we submit it includes all duties necessary for the purpose of the vessel. Certainly it embraces duties essential to the safety of the vessel qua vessel, which is this case.

This Court has repeatedly heretofore had occasion to define "navigation". In the case of *The "Sylvia"*, 171 U.S. 462 (1898), the question concerned the applicability of the exemptive provisions of the Harter Act, which relieved of all responsibility for damage by "fault or error in navigation or in the management of the vessel". "Navigation" and "management" have been used regularly as synonymous terms. It was held there was no liability for failure during the voyage to close certain iron shutters, because this was an error in navigation. The court said on Page 466:—

> "the words 'navigation' and 'management' . . . include, at the least, the control, during the voyage, of everything with which the vessel is equipped for the purpose of protecting her and her cargo against the inroad of the seas; and if there was any neglect in not closing the iron covers of ports, it was a fault or error in the navigation or in the management of the ship. This view accords with the result of the English decisions upon the meaning of these words."

To define "navigation" in the limited manner urged by the petitioner would make for unnecessary confusion and

would involve either the reversal of all previous decisions or the creation of a special application thereof to this limited class of bargemen. It seems preferable to continue the well established principle that all those maritime employees who are permanently attached to a vessel which usually operates beyond the confines of a harbor are in navigation. Thus a musician, *The Sea Lark*, 14 F. (2d) 201; a cook, *Ex Parte Kogi Saito*, 18 F. (2d) 116; and a porter, *Spinetti v. Atlas SS. Co.*, 80 N. Y. 71, have been held to be seamen, and they may sue under the Jones Act.

The respondent does not take exception in any way to those decisions which hold that employees rendering temporary harbor help in servicing a vessel do not pertain to navigation and are under the Longshoremen's Act. It seems sufficient, without specifying the various cases thus distinguished, to emphasize the factual differences by noting the duties of the claimant in the *South Chicago* case and herein. The coal passer in the *South Chicago* case was aboard for the purpose of using a stick to facilitate the flow of coal from his boat to the vessel being fueled. Occasionally he did some cleaning aboard the boat. He did not work while the boat was en route. He was paid an hourly wage. He slept and ate off ship. His employment was temporary and he was called each day as he was needed. We agree that such an employee is "in the position of longshoremen or other casual workers on the water" (Page 260). We respectfully submit that the character of the bargee Rusin herein was exactly contrary in all these respects and his duties were not those of longshoremen or casual worker.

IV. The Remedy Under the Longshoremen's Act Is Exclusive and Cannot and Should Not Be Made "Overlapping" for the Sake of Illusory Benefits From Alleged Finality.

Counsel for the respondent find themselves making an argument exactly contrary to that unsuccessfully urged by them as petitioners in *Loverich v. Warner Company*, 118 F. (2d) 690 (CCA 3rd, March 17, 1941), certiorari denied 313 U. S. 577. The *Loverich* case was an admiralty action under the Jones Act which the respondent company defended on the ground of lack of jurisdiction, but the Third Circuit Court of Appeals found for the libellant-bargeman who was held not subject to the Longshoremen's and Harbor Workers' Act (Page 694):

> "We believe that Loverich came within the exception (to Longshoremen's exclusive jurisdiction) as explained and applied by the Supreme Court in *South Chicago Coal & Dock Company v. Bassett*, (1940) 309 U. S. 251."

When the present case succeeded the *Loverich* case before the same Third Circuit Court of Appeals, that court followed its own decision and the denial of certiorari by this Court, and could find no distinction between the present case and the prior *Loverich* case (Record p. 17) "whose facts as to the employee's duties and services aboard the barge are indistinguishable from the facts in the instant case". The *Loverich* case is not only on all fours with the present case, but concerns the same employer, the same employment, the same locale, the same working conditions and the same responsibilities.

Counsel for the petitioner has attacked the *Loverich* decision on two specific grounds of distinction, and at-

tempted to by-pass it on the general ground of allowable inconsistency. When it is stated (Petitioner's Brief p. 34) that the Longshoremen's Act of 1927 was not involved in the *Loverich* case because the accident occurred in 1926, the fact is ignored that the claim for indemnity was dismissed and liability was found only for maintenance and cure which arose long after the termination of the employment of Loverich and after the enactment of the Longshoremen's Act in 1927. When it is stated that the Third Circuit Court of Appeals in the *Loverich* case erred in relying upon the claimant's attainments rather than upon his duties (Petitioner's Brief p. 34), counsel overlooks the express finding upon this point. The language of the Third Circuit Court itself is explicit (Record p. 16):

> "We fail to see any material differences in the facts of the two cases. It is true that in the Loverich case, in specifying the duties of the bargeman and the circumstances under which he performed them, we mentioned that Loverich was a licensed junior engineer and qualified as an able seaman, barge master and second and third mate. But these added attainments of the particular employee were not what constituted him a seaman. The determining factors were the duties he was called upon to perform and the circumstances under which he was required to perform them. The question concerned his actual duties."

The argument that "the (Loverich) decision does not bar a contrary (Rusin) view" (Petitioner's Brief p. 18), or in other words that the Jones Act and the Longshoremen's Act are optional remedies with contrary rules and results, presents the fundamental issue urged by petitioner before this Court. That issue is, can the Court reach one appellate judgment under the Jones Act based on the char-

acter of the duties of a bargee and a completely contrary appellate judgment on the same set of facts under the Longshoremen's Act? No requirement for administrative expedition justifies flatly contrary decisions from the same court.

The petitioner seems to feel that present inconsistencies are so numerous that more would not be too harmful (Petitioner's Brief p. 20): "Even if the result of the principle of finality is an increased likelihood of inconsistent results on similar facts, the administrative benefits from the rule would far outweigh any such objection." This is the counsel of desperation and petitioner must have grave doubts as to the validity of his attempts at definition to conclude with such a plea. Petitioner concedes Rusin could be "inferred" to be a "master or member of a crew", and finally argues it makes no difference how we classify him because the courts must cooperate in being expeditious if wrong.

It is difficult to see how administration is ever promoted by encouraging inconsistency. Any elementary dictionary shows the two states of finality and inconsistency are opposite. How the establishment of the individual sanctity of a multitude of deputy commissioners or the removal of uniformity of appeal in all cases will do more than compound confusion is hard to understand. Whatever of inconsistency has heretofore existed can and will be remedied to the greatest extent possible by a definitive decision from this Court establishing bargemen with duties such as Rusin within the exemptive class.

The petitioner makes no reference to the fact that Sec. 5 of the Longshoremen's Act makes the remedy exclusive. This was clearly understood in *South Chicago v. Bassett*, 309 U. S. 251, 256:

> "For those employees who are entitled to compensation, the remedy under the Act is exclusive. Sec. 5. This made inapplicable to such employees the provisions of Sec. 33 of the Merchant's Marine Act (called the Jones Act) which carried to 'seamen' at their election the benefit of the Federal Employer's Liability Act."

This was the clear understanding in the immediately subsequent case of *Carumbo v. Cape Cod S. S. Co.*, 123 F. (2d) 991, 994, where the First Circuit Court of Appeals held the two actions mutually exclusive, using the following language:

> "If the plaintiff is a 'seaman' under the Jones Act and a 'member of a crew' under the Longshoremen's Act, then he is free to sue under the Jones Act. If he is not a 'member of a crew' under the Longshoremen's Act, he must proceed under that Act and he is not entitled to maintain this suit under the Jones Act."

The terms of the Longshoremen's Act and the decisions of this Court deny the petitioner's conclusion that (Brief p. 22): "The setting aside of the Deputy Commissioner's award herein on the theory that the Longshoremen's Act and the Maritime law cannot overlap and are mutually exclusive, is squarely contrary to the principle of the *Davis* case."

In *Davis v. Department of Labor*, 317 U. S. 249, this Court considered the problem of conflicting state and federal jurisdiction over claim for the death of a steel worker who was also a harbor worker temporarily on navigable waters. The Washington state compensation act provided it should embrace all employees not covered by maritime law whereas the Longshoremen's Act provides in Sec. 3

that it covers "only . . . if compensation proceedings may not be validly provided by state laws." This Court relied upon the presumption of constitutionality of the state statute in reversing four state tribunals and permitting recovery under the state act, at the same time conceding that it was possible to find jurisdiction in either the state or federal courts. The majority opinion was centered on the problems raised by the interpretation of Article III Par. 2 of the federal constitution by this Court in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, 216.

Now petitioner desires to extend the uncertainties inherent in *Davis v. Department of Labor* by permitting the Longshoremen's Act jurisdiction to overlap with that of the Jones Act. This would put the employer in triple jeopardy. Giving the employee three optional remedies would be no kindness but only increase the murkiness of the multiple twilight zones created.

This Court rejected this overlapping theory in the *Davis* case itself by intimating that Sec. 5 of the Longshoremen's Act became fully effective immediately it was determined that the jurisdiction was federal rather than state. On page 256, this Court said:

> "That section (5) gains meaning only after a litigant has been found to occupy one side or the other of the doubtful jurisdictional line, and is no assistance *in discovering* on which side he can properly be placed."

It is of some importance to note that any attempt to permit the claimant to elect to proceed under either the Jones Act or the Longshoremen's Act or the State Compensation Act will make it impossible for the employer to know his liabilities.

V. The Conclusion of the Circuit Court of Appeals That Claimant Rusin Was a Master or Member of the Crew Was Well Founded in Fact and in Law.

Rusin was permanently connected with his vessel day in and day out, living, eating and sleeping there, paid by the month. He had no shore duties and no cargo duties. His were the humble duties of the seafaring seaman rather than those of the licensed personnel, but he was exclusively concerned with the operation of his vessel, under way and at all times. His duties pertained to navigation, and in the fundamental use of the terms he was "a master or member of a crew" necessary to the safety and operation of his vessel.

The basic facts competently found by the Commissioner rightly call for the conclusion of the Third Circuit Court of Appeals, that the petition in the nature of an appeal from the Deputy Commissioner should be allowed and the claim under the Longshoremen's and Harbor Workers' Act should be dismissed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1943.

No. 362.

AUGUSTUS P. NORTON, Deputy Commissioner for the Third Compensation District,

Petitioner,

v.

WARNER COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF OF AMICUS CURIÆ.

ABRAHAM E. FREEDMAN,
For National Marine Engineers Beneficial Ass'n.,
WILLIAM L. STANDARD,
For National Maritime Union,
E. BURKE FINNERTY,
For Inland Boatmen's Union, Railroad Division,
Amicus Curiæ.

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IN THE

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October Term, 1943.

No. 362.

AUGUSTUS P. NORTON, DEPUTY COMMISSIONER FOR THE THIRD COMPENSATION DISTRICT,

Petitioner,

v.

WARNER COMPANY.

BRIEF OF AMICUS CURIÆ.

INTRODUCTION.

Rusin was a typical bargeman engaged in the routine duties incidental to that position. He did whatever was necessary aboard the barge in the conduct of its ordinary business. He would assist in shifting the barge, making lines fast, tightening or slackening the lines when necessary, managing navigational lights, keeping the vessel free of water and otherwise generally looking to the welfare and enterprise of the vessel.

The problem confronting the Court is whether Rusin was a seaman, in the sense that he was a member of the crew of a vessel and governed by the Maritime law or whether he was a longshoreman and governed by the Compensation Act.

The question here before the Court transcends the particular facts involved and in fact goes beyond the particular

group of workers of which Rusin was a member. The principle involved concerns not only bargemen but also every class of employee who work on boats in and around harbors such as men who work on tugboats, dredges, lighters, scows and other forms of water craft. There is no separate rule which would apply to barges or any other type of vessel. The rule rather makes a distinction between the men who are attached to the particular vessel as one of the "ship's company", as distinguished from those who come aboard either before the vessel has commenced or after she has concluded her enterprise.

The Courts have been far from consistent in attempting to differentiate between these two groups and an analysis of the opinions discloses that the Courts in some instances have overlooked the basic concepts of the Maritime law in testing the status of the particular employee. The Compensation Act excludes seamen who are members of the crew of a vessel in navigation. It is appropriate therefore to determine first what is meant by the term vessel, what type of craft are included and finally who comprise her crew.

WHAT CONSTITUTES A VESSEL IN NAVIGATION.

In speaking generally of a vessel in navigation, one is apt to think of an ocean going steamer engaged in some trade. The term, however, implies practically every other form of watercraft including all the various types of harbor and inland water vessels which are engaged in or in aid of navigation. Congress very early defined the term vessel as follows, (R. S. sec. 3, 1, U. S. C. A. 3):

> "The word 'vessel' includes every description of watercraft or other artificial contrivance used, or capa-

ble of being used, as a means of transportation on water."

The word "Transportation" is not expressly or impliedly limited to the carriage of passengers or merchandise for hire. A pleasure yacht or an ice boat is a vessel within the meaning of the Act of Congress equally with merchantmen or an ocean liner, although the ice boat may be designed solely to keep navigation open and the pleasure yacht may carry neither passenger nor merchandise for hire. *The International* (Pa. 1898) 89 Fed. 484, 32 C. C. A. 258.

Barges, canal boats, etc. used in transportation, though having no mast or sails or motive power of their own, are vessels within Admiralty Jurisdiction. *The Dick-Keys*, Fed. Cases No. 3,898; *Kate Tremaine*, Fed. Cases No. 7,622.

A barge or lighter employed in transporting stone used in the construction of a breakwater is a vessel. *Com. v. Breakwater Co.*, 214 Mass. 10.

Scows, though having no propelling power of their own, are vessels. *Ellis v. U. S.*, 27 S. Ct. 600, 206 U. S. 246, 51 L. Ed. 1047; *The General Cass*, Fed. Cases No. 5307.

The Act includes a scow 110 feet long and 34 feet wide, without motive power of its own, employed in carrying mud from the harbor to the dumping ground. *In Re: Eastern Dredging Company*, 138 Fed. 942.

A raft made of cross ties used as a convenient mode of bringing them to market manned by a pilot, crew and cook and propelled by the tides, by poles and by oars, is a vessel within this section. *Seabrook v. Raft of Railroad Crossties*, 40 Fed. 596.

A pump boat, which is a floating structure equipped with engine, boiler, pumps and pipes and used for pumping out coal barges and is capable of being moved on the water

by ropes or by being towed, is a vessel within this section and subject to Admiralty Jurisdiction. *Charles Barnes Co. v. One Dredge Boat,* 169 Fed. 895.

Float dredges are vessels. *Ellis v. U. S.* (supra). A steam dredge without motive power of its own but capable of being towed from place to place is a vessel within the definition given by this section. *Saylor v. Taylor,* 77 Fed. 476; *McRae v. Bowers Dredging Company,* 86 Fed. 344.

A steam dredge and the scows used in connection with it are each a vessel within this section. *The International* (supra); *"The Alabama",* 22 Fed. 449; *The Starbuck,* 61 Fed. 502.

A flat boat with a pile driver and its engine erected thereon, mainly used in the construction of bulkheads and in transporting materials used in the work capable of being towed for that purpose, is a vessel within this section. *Southern Log Cart and Supply Co. v. Lawrence,* 86 Fed. 907.

Even a houseboat, which is not permanently attached to the shore though without motive power, is a vessel and subject to maritime liens. *"The Ark",* 17 Fed. (2d) 446.

It could not be disputed, nor is it denied here that the barge in question was a vessel in navigation. It remains now to determine the indicia of those who constitute "members of the crews" of these vessels.

WHO ARE MEMBERS OF THE CREW OF A VESSEL.

Prior to the Jones Act (46 U. S. C. A. 688), (1920), the term "seaman" was generally used in referring to the ship's company and there was no reason to distinguish that term from the term "member of the crew". On the contrary the terms were used interchangeably and there was never any doubt that both terms meant the ship's com-

pany. Congress defined the term "seaman" in the Merchant Shipping Act as follows: (46 U. S. C. A. 713):

> "In the construction of this chapter, every person having command of any vessel belonging to any citizen of the United States shall be deemed to be the 'master' thereof; and every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same shall be deemed and taken to be a 'seaman'; and the term 'vessel' shall be understood to comprehend every description of vessel navigating on any sea or channel, lake or river. . . ."

In early times the ship's crew performed not only the work incident to the operation of the vessel, but also took care of loading and discharging cargo while the vessel was at rest. In the course of time, however, these latter duties became so specialized that commercial exigencies caused the development of a separate labor group which was especially proficient in the handling of cargo. Under the new regime, these men, known as stevedores or longshoremen, were employed by a shore employer, an independent contractor, who would be engaged by the vessel to load or discharge the ship. There was no privity of contract between the ship and these men as there was between the ship's crew and the vessel. They had no lien against the vessel for wages, *Paul v. Bark Ilex*, 2 Woods, 229, and they were characterized as landsmen when compared to members of the crew: *"The Ole Oleson,"* 20 Fed. 384. With respect to torts, the stevedores had a right of action governed by the Maritime law, not because they were members of the crew, but because the tort occurred on navigable waters in connection with a maritime service. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 58 L. Ed. 1208, 34 Sup. Ct. Rep. 733. In

the latter case, the Court distinguished this group of workers from the ship's company as follows, Page 62:

> "Formerly the work was done by the ship's crew; but owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners'."

Thus, although both groups of employees while on navigable waters are governed by the Maritime law, the line between them is sharply drawn. The seaman looks to the vessel and the shipowner, while the longshoreman looks to his stevedoring employer. Until the passage of the Jones Act (46 U. S. C. A. 688) in 1920, there was no difficulty in differentiating between a seaman and a longshoreman. There was no occasion for the latter to be termed a seaman and he was referred to as a longshoreman or stevedore and not as a seaman. The latter was always identified as one of the ship's company or a member of the crew.

With the enactment of the Jones Act, the term "seaman" was construed to include not only the ship's company but also those maritime workers known as longshoremen and stevedores. This Court so construed the term "seaman", in *International Stevedoring Co. v. Haverty,* 272 U. S. 50, 71 L. Ed. 157, 47 S. Ct. 19, and applied the benefits of the Jones Act to the longshoremen. The Court makes it abundantly clear, however, that the stevedores are classified as seamen only for the purpose of the Jones Act so as to nullify the effect of the fellow servants rule as to those men. The Court expressly leaves intact the meaning of the term insofar as it had always applied to the ship's company. Said the Court, p. 52:

"It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen'. But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew, Atlantic Transport Co. v. Imbrovek, 234 U. S. 52, 62, 58 L. ed. 1208, 1212, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. Rep. 733. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case, they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less then a century, we are of opinion that a wider scope should be given to the words of the act, and that in this statute 'seamen' is to be taken to include stevedores employed in maritime work on navigable water, as the plaintiff was, whatever it might mean in laws of a different kind."

Thus the longshoremen were termed seamen but only in a limited sense for the purpose of the Jones Act. The Court was careful to indicate that in regard to other laws they would not be so regarded, as for example in connection with the right to maintenance and cure and wages. It may, therefore, be fairly stated that the term "seaman" may be used synonymously with "member of the crew", if we should eliminate longshoremen and stevedores from consideration. The Longshoreman's Compensation Act, (33 U. S. C. A. 901 et seq.) did so eliminate the longshoremen from the benefits of the Jones Act. The Longshoreman's Act adopted in 1927, expressly excludes from its coverage

the "master or member of the crew of any vessel". (sec. 903.) It is indisputably clear that Congress did not intend to include within the provisions of the Act those men who had always been classified as seamen prior to the Jones Act. Those men neither wanted nor required the benefits of a compensation act since the remedies which they already had were substantially superior to the remedies afforded by the Compensation Act. This Court pointed out this very distinction in *Warner v. Goltra,* (1934), 55 S. Ct. 46, 293, U. S. 155, 79 L. Ed. 254, as follows (pp. 159-160):

> "The scheme of legislation becomes symmetrical and consistent when the Merchant Marine Act of 1920 is read in the light of another act in pari materia, the Longshoremen's & Harbor Workers' Compensation Act (U. S. C. title 33, § 901 et seq.) adopted in March 4, 1927. This act expressly excludes from its 'coverage' a 'master or member of a crew of any vessel.' § 903. The exclusion was at the request of seamen who notified the committee in charge that they preferred the remedy for damages under the act of 1920 to the benefits that would be theirs under a system of workmen's compensation. See Hearings before a Subcommittee of the Senate Committee on the Judiciary, 69th Cong. 1st Sess. on S. 3170, at p. 17; Cong. Rec. 69th Cong. 2nd Sess. vol. 68, part 5, p. 5908; Nogueira v. New York, N. H. & H. R. Co., 281 U. S. 128, 134, 136, 74 L. ed. 754, 758, 759, 50 S. Ct. 303. The bill was accordingly amended in its progress through the House by declaring the exception. There can be little doubt that Congress did this in the belief that under the statutes then in force master and crew alike were already adequately protected in case of injury or death. The belief had a sound foundation in the act of 1920. Cf. Nogueira v. New York, N. H. & H. R. Co., supra, at p. 134."

To allow the compensation act to extend into the field governing the regular seamen would be a step backward

and not forward. A comparison of the remedies afforded by the Compensation Act with the remedies provided under the maritime law as hereinafter set forth proves beyond any doubt the superiority of the latter. The question now arises: who are seamen? What group or groups of men does the term embrace and what are the tests which distinguish a seaman as one of the ship's company.

Some of the comparatively recent decisions, in determining whether a man is a "member of the crew", have employed as the criterion the man's prior record to see if he was an experienced seaman, while others have relied on the nature of the man's duties. (See opinion of District Court in instant case.) It was reasoned that if the man had not been a qualified mariner he could not be a member of the crew; or if his duties were similar to those of a laborer or a harborworker, then he is likewise not a member of the crew. None of these theories will bear analysis.

The nature of a man's duties on board the vessel, his prior experience and other incidents of his employment such as his sleeping and eating on board the vessel, are of course evidence of his status on the vessel, but that status cannot be determined without taking into consideration certain other critical factors which go to the very root of the question. To determine whether a man is a member of the crew of a vessel, we must first consider the nature of the vessel itself and then, what is most important, we must consider *the nature of the enterprise in which the vessel is engaged.* All those who are engaged in furtherance of that enterprise are "members of the crew", irrespective of any other considerations. It is not infrequent that the duties of longshoremen are identical with the duties of men who are concededly "members of the crew". The

distinction, therefore, cannot be determined by the nature of the duties alone, but by a consideration of (1) the relationship of the seaman to the vessel, (2) the nature of the enterprise in which the vessel is engaged, and (3) the relationship of the duties to be performed in conjunction with the vessel's main enterprise. In other words, if the vessel is engaged in the carriage of passengers or cargo, all those whose duties aboard the vessel were in aid of that purpose would be members of the crew even though they were not all engaged in navigating the vessel. Thus, for example, horsemen, signed on a vessel to care for horses during the voyage are "members of the crew": *U. S. v. Atlantic Transport Co.*, 188 Fed. 42, cert. den. 223 U. S. 724. Musicians employed aboard a steamer are "members of the crew", even though they do not assist in any way in the actual navigation of the vessel: *"The Sealark"*, 14 F. (2d) 201. A clerk on a steamboat is a mariner: *"The Sultana"*, Fed. Cas. No. 13,602. A bartender on a vessel is a "member of the crew": *"The J. S. Warden"*, 175 Fed. 314. Woman telephone operator is a "member of the crew": *"The Malolo"*, 1931 A. M. C. 426. Men employed by a motion picture producer to navigate a vessel as actors in the production of a play are nevertheless seamen and governed by the General Maritime law to the exclusion of the local (Cal.) Compensation Act: *"Old Ironsides"*, 1929 A. M. C. 300. The ship's carpenter, who does not assist in navigation is a "member of the crew": *Sheridan v. Furbur et al.*, Fed. Cas. No. 12,761. A person in charge of a confectionery stand on a steamer is a member of the crew: *Conner v. The Ship Flora*, 6 Exq. Ct. Reports (Can.) 151. In the *Baron Napier*, 249 Fed. 126, a muleteer, performing the services of a watchman was given the status of a seaman.

Persons employed on a fishing tug solely for purpose of catching and preserving fish are mariners notwithstanding they take no part in the navigation of the vessel: *"The Minna"*, 11 Fed. 759. The criteria relating to members of the crew were very aptly stated in the early case of *"The Ocean Spray"*, Fed. Cas. No. 10,412, as follows:

> "No case has been cited upon the point of whether a sealer is to be considered a mariner, and therefore entitled to a lien upon the vessel for his wages. It is admitted that such persons as surgeons, carpenters, cooks, stewards and cabin-boys are considered mariners. But it is claimed that this is so for the reason that these persons all aid in the navigation and preservation of the vessel. *But I think the better reason is found in the fact that they are co-laborers in the leading purpose of the voyage.* Upon this ground, even if it be admitted that the libellants shipped and served as sealers only, they ought to be deemed mariners. They were certainly co-laborers, and the principal laborers, in the only purpose of this voyage—the taking of fur-seal. The seamen, who have an undoubted lien upon the vessel for their wages, only contributed to this purpose by navigating it. Without these sealers the voyage must have been profitless, because the purpose of it could not have been accomplished."

The foregoing, and many other illustrations compel the conclusion that the employee's duties alone are insufficient to test his status but that they must be considered in the light of the vessel's enterprise. In the instant case, the vessel, a barge, was engaged in the transportation of cargo, and every person who was employed to aid in the conduct of that enterprise was necessarily a member of her crew.

Obviously, Rusin was clearly within that category. The principle which characterizes "members of the crew" extends much further than the crews of barges which are engaged in transportation. There are many other forms of enterprise in which a vessel may engage beside the transportation of passengers or cargo. Among these are dredging operations which are in aid of navigation. It will immediately be seen that the duties incident to such an operation are entirely different from those ordinarily incident to a passenger or cargo vessel. Yet the dredge, as will clearly be shown, is engaged in navigation equally with the other vessels and the men who operate her are also "members of the crew". The duties of the latter, although similar in many respects to those of laborers are nevertheless in aid of the vessel's enterprise. The test in distinguishing members of the crew is whether the workmen contribute in any degree to the accomplishment of the main objective in which the vessel is engaged. The rule was set forth in *Saylor v. Taylor*, 77 Fed. 476 at p. 478, as follows:

> "It is difficult to fix with precision any line of delimitation between services essentially maritime and those claimed to be such because performed upon a vessel at sea, or within the ebb and flow of the tide; nor will it be profitable to follow the struggle for jurisdiction between the courts of common law and the courts of admiralty. It is now well settled that all persons employed on a vessel to assist in the main purpose in which she is engaged are entitled to a lien for wages. So it has been held that clerks, carpenters, chambermaids, cooks, stewards, and waiters are so entitled, Dest. Shipp. & Adm. S. 173, and cases there cited. The statute above referred to, which declares that persons employed 'in any capacity' upon vessels shall be deemed 'seamen', seems conclusive upon this point. If

it be considered necessary to give a reason for a rule supported by a great weight of authority, it would be found in this, that a vessel and her crew are considered a unit. Each person aboard of her contributes according to his capacity to the success of the enterprise in which she is engaged. If she comes within the maritime jurisdiction, the persons employed aboard of her come also, with all the rights and disabilities which flow therefrom. Among those rights, from the days of Oleron, are that the ship stands responsible for the wages of the seamen. It is this assurance that enables her to command those services that are essential to the prosecution of her enterprises.

. . . .

"At first blush it would seem a stretch of the rule to hold a dredge and her accompanying scows to belong to the same class with ocean steamships. The idea of commerce does not come into the mind primarily in connection with such craft; but, when it is borne in mind that they are constructed to move upon the water, and nowhere else, and that, while thus moving upon the water, they are subject to all the rules that govern other water craft as to lights, collisions, etc., it will be seen that they have that mobility and capacity to navigate which are recognized as the prime elements in determining the subjects of maritime liens. And so it seems a stretch of the imagination to class the deck hands of a mud dredge in the quiet waters of a Potomac creek with the bold and skillful mariners who breast the angry waves of the Atlantic; but such and so far-reaching are the principles which underlie the jurisdiction of the courts of admiralty that they adapt themselves to all the new kinds of property and new sets of operatives and new conditions which are brought into existence in the progress of the world. Hence it is that in all times and in all countries those who are employed

upon a vessel in any capacity, however humble, and whose labor contributes in any degree, however slight to the accomplish ent of the main object in which the vessel is engaged, are clothed by the law with the legal rights of mariners, no matter what may be their sex, character, station, or profession. Ben. Adm. S. 241."

In *M'Rae v. Bowers Dredging Co.*, 86 Fed. 344, the Court was required to determine which of the vessel's personnel were members of the crew and as such entitled to a lien against the vessel for wages. At page 348, the Court said:

"A dredging vessel, designed to facilitate navigation, by going from place to place, to be used in deepening harbors and channels, and removing obstructions from navigable rivers, and to bear afloat heavy machinery and appliances for use in that class of work, may commit, or be injured by, a marine tort, and she may become subject to a maritime lien for salvage. She has mobility, and her element is the water. She can be used afloat, and not otherwise. She has carrying capacity, and her employment has direct reference to commerce and navigation. I perceive no reason for exempting such a vessel from the liabilities arising from non-payment of the wages of her crew, or from such unfulfilled contracts as would subject other vessels to liens enforceable by a court of admiralty.

"I find no difficulty in pronouncing in favor of the engineers, firemen, deck hands, and captains who worked on board of the dredges. They have maritime liens for the balances due to them for wages. The captains were not clothed with the authority of masters, but were simply foremen in charge of the working crews. Therefore the rule that the master of a vessel has no lien for wages does not apply to them.

> Those who worked as general mechanics in keeping the machinery in repair, and the pipe men, who attended to laying, connecting, and moving the lines of pipe, and those who performed necessary labor upon and about the filled area, are also entitled to liens. Their services were required in prosecution of the enterprise in which the vessels were employed. The right to claim a lien for wages under the general maritime law is not restricted to favor only mariners who serve the ship with peculiar nautical skill, but extends to all whose services are in furtherance of the main object of the enterprise in which the ship is engaged. The Minna, 11 Fed. 759; The Ocean Spray, Fed. Cas. No. 10,412."

In the *Z. R. 3,* 18 Fed. (2d) 122, the vessel was engaged in catching, packing and salting fish. Libellant was one of those engaged to pack and salt the fish in the course of the voyage. Suit was brought against the vessel for wages. Said the Court, p. 123:

> "As presently employed, a seaman is not a mariner in the full sense of the word—a person 'who can hand, reef, and steer.' Changing conditions, and necessities for changes, extended the term to include all persons employed in a vessel to assist in the main purpose of the voyage. Clearly, the main purpose of the voyage was to pack and salt fish. See The Minna (D. C.) 11 F. 759; The Sea Lark (D. C.) 14 F. (2d) 201."

In *The Hurricane,* 9 F. (2d) 396, a dredge foreman who was not licensed was held to be a member of the crew and entitled to a lien for wages.

The duties of a vessel's personnel may in many instances be identical with the duties of laborers or longshoremen. Obviously, therefore, the duties alone are insufficient to determine the employee's status. In this

connection the Court made a very pertinent observation in *Maryland Casualty Co. v. Lawson*, 94 F. (2d) 190, as follows (p. 192):

> "There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise and to protect her in emergency, and a right to look to her and her earnings for wages. If she has a master, there is subjection to his commands. The nature of the work done is not determinative. Engineers and cooks as well as sailors are included. Longshoremen who load and unload a vessel under temporary local employment do not become members of the crew, nor do mechanics who similarly come aboard her to repair or clean or paint her; *nor do those permanently employed upon her cease to be members of the crew because they are put at the same sort of work.*" (Italics ours.)

In *Kibadeaux v. Standard Dredging Co.*, 81 F. (2d) 670, a deckhand on a dredge sued to recover damages under the Jones Act for personal injury on the dredge. The suit was dismissed by the Court below for want of jurisdiction. In reversing the lower court, the Court of Appeals held the deckhand a member of the crew, governed by the maritime law to the exclusion of the compensation laws. In a well considered opinion the Court, after summarizing the authorities on the point, said, p. 674:

> "'Whatever the nature of their work, it is incident to their employment on the dredges and scows, as in the case of an engineer or coal shoveler on board ship.' As against a regulatory city ordinance, a dredge was held to be a vessel and her engineers seamen in Los Angeles v. United Dredging Co. (C. C. A.) 14 F. (2d) 364. This dredge was a vessel and Kibadeaux

a seaman and a member of her crew. An injury to him by the unseaworthiness of the vessel was cognizable in admiralty. Neither the Longshoremen's Act nor the state statutes apply."

SOUTH CHICAGO COAL AND DOCK CO. V. BASSETT.

There has been some confusion concerning the interpretation of the opinion of this Court in the case of *South Chicago C. & D. Co. v. Bassett*, 309 U. S. 251, 60 S. Ct. 544, 84 L. Ed. 732. An analysis of that decision clearly shows it to be consistent with the argument which we make here. In that case, the vessel, a lighter, was engaged in transporting coal from the dock to other ships in the harbor. The employee was engaged as a deckhand but his main and primary duty was to facilitate the flow of coal to the vessel being fueled *after the vessel was at rest.* He performed no navigation duties; he slept at home and boarded off the ship. *He did no work while the boat was en route from the dock to the vessel being fueled.* The Court considered these facts as significant and the decision must be read in the light of these facts. The employee was drowned in the course of his employment and the deputy commissioner found that he had not been a "member of the crew" and rendered an award of compensation to the widow. This finding was sustained by the Supreme Court. In discussing who were members of the crew this Court said, p. 260:

> "This Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen (International Stevedoring Co. v. Haverty, 272 U. S. 50, 71 L. ed. 157, 47 S. Ct. 19, supra), were still regarded as distinct from members of a

'crew'. They were persons serving on vessels, to be sure, but their service was that of laborers, of the sort performed by longshoremen and harbor workers and thus distinguished from those employees on the vessel who are naturally and primarily on board to aid in her navigation."

The last sentence has been misinterpreted in some instances and some courts have reasoned that unless the employee's duties are related to the actual navigation of the vessel then he is not a seaman. We suggest that the Court in the *Bassett* case never intended any such interpretation. The more reasonable construction, and one most consistent with the basic principles involved, is that all those who are engaged in the vessel's main enterprise and are primarily on board to aid her in that enterprise while she is engaged in navigation are members of her crew.

In the *Bassett* case the vessel's main enterprise was transportation of coal from the dock to a vessel in the harbor. While she was en route from the dock to the ship, she was engaged in the dominant purpose of her existence—*transportation*. All those who aided her or performed any services incidental to that purpose were members of her crew. When she reached the vessel to be fueled she was then at rest, and discharging her coal was only incidental to her main enterprise. It is this type of service which is ordinarily performed by longshoremen and not members of the crew.

In considering whether the decedent in the *Bassett* case was a member of the crew the Court laid particular stress upon the fact that the decedent had no duties to perform while the vessel was en route on her voyage. This is unquestionably the most important and vital element in determining whether a man is or is not a member of the

crew. In fact it may be stated that the decedent could very well have remained on the pier while the vessel was embarked on her voyage and his absence would never be felt on the vessel while en route. We venture to suggest that the court would have reached the opposite conclusion if the decedent was required to perform any services or had any duties while the vessel was en route. Without such evidence, it could not be said as a matter of law that the decedent was a member of the crew. In the case at bar, Rusin was specifically required to perform all the duties necessary to the welfare and operation of the vessel during her actual journey.

Petitioner argues at some length that not only are the commissioner's findings of fact final but all the inferences and conclusions should likewise be accorded finality if there is any evidence to support them. We think this argument goes far beyond the rule established by the cases cited in support by Petitioner.

There is, of course, a vast distinction between the weight which is given to a fact finding of the commissioner and a legal conclusion drawn from those facts. The courts have sustained fact findings where there is substantial evidence in support and where the finding is not against the great weight of the evidence. Where conclusions of law are concerned, however, an entirely different rule prevails. The court may consider the commissioner's conclusions as advisory but in no way binding. The procedure is analogous to that relating to special masters and commissioners in admiralty. *Crowell v. Benson,* 285 U. S. 22. None of the cases cited go beyond this rule. A distinction must also be drawn between an inference of fact and a conclusion of law. For example, if an automobile fails to stop

when the brake is applied, it justifies the factual inference that the brakes are out of order or defective. It may also be concluded from those facts as a matter of law that the automobile owner was negligent in failing to have the brakes in proper working order. The inference of fact that the brakes were defective could well be accorded finality but the latter conclusion is always subject to judicial review and if contrary to legal principles would have to be reversed. The cases cited by petitioner involve principally factual inferences such as we have suggested above.

It has been suggested that there is a "twilight zone" between longshoremen and members of the crew as exhibited in the case of *Davis v. Department of Labor*, 317 U. S. 249. We submit that there is no basis for such an interpretation. Moreover, we assume further that this court will bend every effort to define the exact line of demarcation between these two groups of employees in order to avoid such a "twilight zone". In the *Davis* case this court used the term "twilight zone" only because it felt compelled to do so because of the much criticized and so-called "ill starred" *Jensen* case, 244 U. S. 205. This entire court in the *Davis* case expressly indicated its disapproval of the *Jensen* doctrine but felt that a reversal of policy should be a matter for the legislative rather than the judiciary. To permit a "twilight zone" to enter the picture here is to expand the uncertainty and confusion. We submit that under the rule which has been followed from the earliest times, longshoremen can be clearly distinguished from members of the crew of any vessel. The employee's duties with relation to the vessel's main enterprise clearly defines the limits of the respective employments. Another test could be to determine whether the

particular employee would have been entitled to maintenance and cure before the Compensation Act was passed. (1927). If the answer be in the affirmative, then he could only be classified as a member of the crew because longshoremen never had that right.

It might also be stated that the Compensation Act is exclusive wherever applicable (sec. 905) and the maritime law is exclusive wherever applicable. *Panama R. R. v. Johnson*, 264 U. S. 375. These would likewise negative any theory of overlapping between these employees.

From the economic standpoint, if a "twilight zone" were permitted, the employee may have an election to select the remedy provided either by the commissioner or that of the admiralty, but any advantage so derived would be more than dissipated because his status would never be certain and would depend on the frame of mind of the particular commissioner or Judge. It is conceivable that a man in the so-called "twilight zone" may be denied recovery by a commissioner and have an admiralty court refuse jurisdiction on the ground that he was not a member of the crew. Petitioner's theory is not only destructive of the uniformity intended by the maritime law, *Panama R. R. v. Johnson*, supra, but it is opposed in principle by majority and dissenting opinions in the *Davis* case.

Petitioner argues that whether a man is a member of the crew is a question of fact and cites the *Bassett* case in support. In analysing the *Bassett* case, petitioner contends that the court rejected the employer's contention that the interpretation of the term "member of the crew" is a question of law. As we read the opinion, the court very definitely considered it was a question of law *but could not conclude from the facts that the employee was a member*

of the crew. This by no means changes the question of law to one of fact. A reference to the pertinent excerpt of the opinion bears out this explanation (p. 258):

> "Petitioners urge that the question whether the decedent was a member of a 'crew' was a question of law. That is, that upon the undisputed facts the decedent must be held as a matter of law to have been a member of a 'crew' as distinguished from a longshoreman or laborer at work upon a vessel. We are unable so to conclude."

The court then goes on to say that the term "crew" does not have an absolutely unvarying legal significance but it indicates very definitely that it is nevertheless a *legal* question and then proceeds to determine the standards which characterize a "crew". The court finally concluded that the facts in the record did not compel the legal conclusion that the employee was a member of the crew. Here again it is significant to note that the Court emphasized the fact that the employee had no duties while the vessel was en route. In the instant case, as in the case of all bargemen, the situation is reversed and the employees are required to perform duties not only when the vessel is en route but to aid and further the vessel's enterprise.

Petitioner refers to the case of *Canty v. McLain Line*, 312 U. S. 667, where a bargeman's suit was dismissed below and was reversed and remanded by this court without hearing on the authority of the *Bassett* case. Petitioner argues from this that it was a question of fact and was sent back for a determination of the facts. Here again an examination into the *Canty* case reveals that all the facts were set forth in an amended libel disclosing in detail all of the bargeman's duties (Par. fourth, sixth and sev-

enth of amended libel.) Notwithstanding all these detailed duties (similar to those at bar) the court below found that they did not warrant the conclusion that the employee was a member of the crew. It may be stated that such findings would have at least the same finality as those of a commissioner if the rule applied to such conclusions. In this view the reversal by the Supreme Court could only mean that it was a question of law and that the findings were contrary to law. That under the facts in the amended libel it must be concluded as a matter of law that Canty was a member of the crew.

Petitioner attempts throughout to differentiate between longshoreman and member of crew by a consideration only of the nature of their respective duties. In this view it is only natural therefore that he should fall into error and argue that there is a "twilight zone" because the duties of both groups are in many respects identical. Were this the correct rule then the term "member of the crew" could only embrace those who "hand, reef and steer".

The true rule does not depend upon the nature of the duties alone, but, as the courts have said, the duties in relation to the vessel's main enterprise are the controlling factor. In the *Bassett* case, the employee's duties had no relation to the vessel's enterprise. In the instant case, the employee had everything to do while the vessel was actually en route on her voyage in the course of her main enterprise. These facts are not susceptible of any conclusion other than that Rusin was attached to the vessel itself as a member of its crew.

RUSIN WAS A MEMBER OF THE CREW.

The vessel was a wooden barge without motive power about one hundred feet long. It was engaged in transporting cargo on the Delaware River within a radius of thirty miles from Philadelphia calling at various ports including Wilmington, Delaware, Chester, Penna., Camden, Cooper's Creek, Riverside and Morrisville, N. J. Rusin received a basic wage of $80.00 per month and ate and slept on board the vessel. He was the only man on the barge although he would have another man helping him at times with the lines. (R. 136 to 138.) His duties were as follows: He attended to the barge's needs, keeping it safe and pumped out; keeping the barge properly tied up and adjusting the lines with the rise and fall of the tide; requisitioning and keeping the barge equipped with lines; report any leaks or anything else necessary to keep vessel in safe condition; to take soundings and keep the barge free of water; he took orders from the Captain of the tug while the vessel was under tow; he responded to orders from the tugboat to slacken or adjust the lines; he was charged with operating the navigational lights; in the absence of the tug he was sometimes required to move the barge himself with the lines and other barge equipment; he had no duties in connection with the handling of cargo. (R. 153-157.)

There is no question about this barge being a vessel in navigation. As such, she required someone to look after her welfare and management while she was carrying her cargo from place to place. Rusin did exactly that. He was on board primarily to aid the vessel in its enterprise of transportation and all his duties were directed to that end. Without his presence on the vessel while en route, the vessel might well founder if soundings were not taken and

the vessel kept pumped out or it might collide with other shipping for want of someone to properly manage her navigational lights. Or she might break away from the towboat for want of someone to look after her lines and keep them adjusted while under tow. These, among other considerations, compel the single conclusion that Rusin was a member of the crew.

This case is typical of the average bargeman. These men, and all those others hereinbefore referred to, have always been afforded the same rights and privileges accorded to seamen sailing the high seas. They are all performing services directly in aid of navigation, and Congress never intended to alter the rights of these men by the Compensation Act. The Compensation Act was intended to benefit only the stevedores and longshoremen who did not previously have the remedies which these men possessed. In fact, it may be stated that another way of determining who were members of the crew as distinct from longshoremen would be to go back before the Compensation Act to ascertain which men enjoyed such additional remedies as maintenance and cure. Longshoremen were never accorded that privilege. Bargemen were always possessed of that right. Admittedly, Congress never intended to disturb any of those vested rights or to deprive anyone of their benefits.

THE APPLICATION OF THE COMPENSATION ACT WOULD NOT RESULT IN ANY SOCIAL OR ECONOMIC BENEFITS BUT WOULD CURTAIL EXISTING RIGHTS.

It has been suggested that the decision in the instant case adversely affects a large class of maritime workers and will deprive them of the social and economic benefits of the Compensation Act. It is further suggested that

these men do not have the benefit of the Public Health Service nor the right to claim maintenance and cure and "can hardly afford to sacrifice the more certain if more modest benefits of the Act for a possibly greater recovery under the Jones Act".

We must respectfully disagree with the Learned Solicitor General in all of these respects. To begin with, the law does make specific provision to afford these men treatment at the Public Health Services. (24 U. S. C. A. 1.) In 29 Op. Atty. Gen. 583, it was held that employees on scows and floating dredges were clearly within this statute. In any event, regardless of what provision may be made for the treatment of these men, the hospital service of the United States is not intended to supersede the maritime law, which imposes an obligation on the vessel and her owner to care for sick or injured seamen, but is only auxiliary thereto. In *Waterman S. S. Corp. v. Jones*, 87 L. Ed. 799, this Court said (L. Ed. p. 802):

> "The provisions for public assistance were not intended to relieve the shipowner of his duty. On the contrary their purpose was to make sure the seaman would have care, if the employer should fail to give it and in the rarer cases to which his obligation does not extend."

The suggestion that these men would be given certain benefits under the Compensation Act as compared with the uncertain benefits under the Jones Act completely overlooks the remedies afforded under the maritime law. To begin with, these men are first entitled to maintenance and cure and if the maritime law stopped there, they would still have greater rights and equally certain. The Compensation Act provides a remedy only for injuries due to acci-

dents. The maritime law allows maintenance and cure for illness as well as accident. Furthermore, the illness need not be caused by the employment. *Calmar S. S. Corp. v. Taylor,* 303 U. S. 525; *Waterman S. S. Co. v. Jones,* Supra. Compensation is allowable only for injuries on board the vessel. Maintenance and cure is allowable for injury or illness sustained on shipboard or on shore while in the ship's service, *Waterman S. S. Corp. v. Jones,* Supra.

Since the right to maintenance and cure is certain and in itself is broader than compensation, it is immediately evident that the seaman would be the loser by being included in the Compensation Act, even if maintenance and cure was his only remedy. However, his remedies do not stop with maintenance and cure. If his illness or injury is due to the unseaworthiness of the vessel or her equipment or to the negligence of the employer or any fellow servant he is entitled to indemnity in addition to his maintenance and cure. *Socony Vacuum Oil Co. v. Smith,* 305 U. S. 424. This Court recognized the advantages of the Jones Act alone over the Compensation Act in *Warner v. Goltra,* supra, when it held that the seamen's belief in refusing the advantages of the Compensation Act had a sound foundation in the Jones Act.

Bargemen such as Rusin, men who work on dredges, scows and other harbor craft have always been recognized as members of the crew of their particular vessels. They have never been segregated from the class of seamen who sail the high seas. In fact, these same barges and other craft frequently recruit their men from the same union halls which supply the largest merchantmen. The Congress in exempting "members of the crew" from the Compensation Act recognized the pleas of the entire industry and intended

to cover only those who did not have the rights which these men enjoy. Longshoremen and stevedores have never had the right to recover for maintenance and cure nor many of the other privileges open to seamen. These same rights have never been denied to men who operate barges, dredges and other watercraft.

To attempt to include this latter group under the compensation laws would accomplish indirectly in part what the shipowners have been trying to accomplish through legislation for many years. It would be a tremendous step backward for the seamen, and certainly of existing rights. This would, of course, be entirely contrary to the expressed interpretations of the Courts.

It is, therefore, respectfully submitted that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
For National Marine Engineers Beneficial Ass'n.;

WILLIAM L. STANDARD,
For National Maritime Union,

E. BURKE FINNERTY,
For Inland Boatmen's Union, Railroad Division,
Amicus Curiæ.

SUPREME COURT OF THE UNITED STATES.

No. 362.—October Term, 1943.

Augustus P. Norton, Deputy Commissioner for the Third Compensation District, Petitioner, *vs.* Warner Company.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

[March 27, 1944.]

Mr. Justice Douglas delivered the opinion of the Court.

The question in this case is whether Nicholas Rusin, a bargeman employed by respondent, is entitled to compensation under the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424, 33 U. S. C. § 901) for injuries received when a capstan bar, which he was using to shift the barge at a pier, pulled out and struck him upon the chest and caused him to fall. The answer turns on whether Rusin was a "master or member of a crew of any vessel". If he was, he is not entitled to the compensation because such persons are expressly excluded from the coverage of the Act by § 2(3) and § 3(a)(1).

The Deputy Commissioner found that Rusin was a harbor worker, not a "master or member of a crew", and granted him a compensation award.[1] The District Court upheld the Deputy Commissioner in a suit which respondent-employer brought to set aside the award. 45 F. Supp. 835. The Circuit Court of Appeals reversed. 137 F. 2d 57. The case is here on a petition for a writ of certiorari which we granted because of the asserted failure of the court below to give proper effect to our decision in *South Chicago Coal & Dock Co.* v. *Bassett*, 309 U. S. 251.

The facts, as found by the Deputy Commissioner and amplified by additional evidence adduced before the District Court, are not in dispute. Rusin was employed as a boatman on a barge which at the time of the injury was afloat on the navigable waters of the United States. The barge had no motive power of its own and was moved either by towing or for shorter distances, by the wind-

[1] Cf. the finding of the Deputy Commissioner in Diomede v. Lowe, 14 F. Supp. 380; 87 F. 2d 296.

ing up of a cable by means of a capstan operated by hand. The barge, which was documented as a vessel of the United States, never went to sea but was confined in its operation to waters within a radius of thirty miles of Philadelphia. Rusin was employed under a union contract with respondent which stated that all bargemen assigned to specific barges in active operation were to be paid a monthly salary of $80 and were to be provided with quarters. It also stated that that compensation was "for all work performed by Bargemen in the operation of his own vessel" and that the rates provided were "based upon all services and time required to safeguard and operate the barge fleet, including necessary pumping, watching, or other emergency duties on Sundays and holidays." Rusin was continuously aboard. He bought his own meals and lived, ate, and slept on the barge. When he worked on any other boat, he received wages at an hourly rate, in addition to the monthly salary. Rusin had little experience as a seaman except that which he obtained as a bargeman. His duties consisted of taking general care of the barge. They included taking care of the lines at docks, tightening or slackening them as necessary; repairing leaks; pumping out the barge; taking lines from tugs; responding to whistles from the tugs; putting out navigational lights and signals; taking orders from the tugboat when being towed; moving the barge at piers by the capstan. He could not set the course or control or change it at any time. He was subject to orders of respondent's marine superintendent except when in tow at which time he was subject to the control of the tugboat captain. But he had no duties in connection with the handling of cargo and no shore duties. At the time of the injury he was the sole person aboard or employed upon the barge.

Sec. 19(a) of the Act gives the Deputy Commissioner "full power and authority to hear and determine all questions in respect of" claims for compensation. And § 21(b) gives the federal district courts power to suspend or set aside, in whole or in part, compensation orders if "not in accordance with law". In considering those provisions of the Act in the *Bassett* case we held that the District Court was not warranted in setting aside such an order because the court would weigh or appraise the evidence differently. The duty of the District Court, we said, was to give the award effect, "if there was evidence to support it." 309 U. S. at 258. And we stated that the findings of the Deputy Commissioner were conclusive even though the evidence permitted

conflicting inferences. *Id.* p. 260. And see *Parker* v. *Motor Boat Sales, Inc.*, 314 U. S. 244, 246. This statement of the finality to be accorded findings of the Deputy Commissioner under the Act was not new. It had been stated in substantially similar terms in *Voehl* v. *Indemnity Insurance Co.*, 288 U. S. 162, 166, and in *Del Vecchio* v. *Bowers*, 296 U. S. 280, 287. The rule fashioned by these cases followed the design of the Act of encouraging prompt and expeditious adjudication of claims arising under it.[2] By giving a large degree of finality to administrative determinations contests and delays, which employees could ill afford and which might deprive the Act of much of its beneficent effect, were discouraged. Thus it is that the judicial review conferred by § 21(b) does not give authority to the courts to set aside awards because they are deemed to be against the weight of the evidence. More is required. The error must be one of law, such as the misconstruction of a term of the Act.

We think the award granted by the Deputy Commissioner had such an infirmity.[3]

If the award were to stand, there would be brought within the Act a group of workers whom we do not believe Congress intended

[2] Sec. 14(b) makes the first instalment of compensation due on the fourteenth day after the employer has knowledge of the injury or death. Sec. 14(f) provides that if compensation, payable under an award, is not paid within ten days after it is due, a penalty of twenty per cent is added. Sec. 18 provides for the issuance by the Deputy Commissioner of a supplementary order when an employer is in default of payment of compensation due under an award for a period of thirty days. On such an order judgment and execution may be obtained in the federal district courts, the supplementary order of the Deputy Commissioner being final. Any waiver of the right to compensation under the Act is made invalid by § 15(b). Agreements for compensation not made in accordance with the Act are outlawed. §§ 15(a), 16. Limitations on the granting of interlocutory injunctions staying payment of compensation while an award is being contested are contained in § 21(b). And the United States Attorney is directed to appear on behalf of the Deputy Commissioner and defend compensation orders. 45 Stat. 490, 33 U. S. C. § 921a.

[3] In Davis v. Department of Labor, 317 U. S. 249, we were dealing with the problem of determining whether a so-called harbor worker could be compensated under a state act or must come under the Longshoremen's and Harbor Workers' Act. That problem was embarrassed by the fact that the line between federal and state domain had been drawn with reference to the rule of the *Jensen* case. There are no such complications here. In this case the line is one which Congress has drawn between two mutually exclusive federal systems. The risk of employees choosing the wrong remedy has been anticipated by Congress and at least partially avoided. For § 13(d) provides that where recovery is denied to any person in a suit brought at law or in admiralty to recover damages on the ground that his remedy was under the Longshoremen's and Harbor Workers' Act the limitation of time for making application for an award begins to run "only from the date of termination of such suit".

to include. The Senate Report makes clear that "The purpose of this bill is to provide for compensation, in the stead of liability, for a class of employees commonly known as 'longshoremen'. These men are mainly employed in loading, unloading, refitting, and repairing ships." S. Rep. No. 973, 69th Cong., 1st Sess., p. 16. We reviewed the history of the Act in the *Bassett* case and in the *Parker* case, and more recently in *Davis* v. *Department of Labor*, 317 U. S. 249. As we noted in those cases, the Act was adopted to meet the difficulties engendered by the decision in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205. And see *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149; *State of Washington* v. *W. C. Dawson & Co.*, 264 U. S. 219. That line of cases carved out a domain in which, according to a majority of this Court, state law could not constitutionally afford compensation to maritime employees. It was to fill that gap in the system of workmen's compensation that the present Act was passed. S. Rep. No. 973, *supra*, p. 16. But as we pointed out in the *Bassett* case (309 U. S. pp. 256-257) the effort to bring a master and members of a crew of a vessel under the Act was successfully opposed by the representatives of maritime employees. See *Nogueira* v. *New York, N. H. & H. R. Co.*, 281 U. S. 128, 136; *Warner* v. *Goltra*, 293 U. S. 155, 159-160. And the maritime unions which appeared as *amicus curiae* in the present case emphasize the importance of that exception. The liability of an employer under the Act is exclusive. § 5. On the other hand, those who are not covered by it but who are protected by maritime law are entitled to maintenance and cure, a remedy not restricted to accidents. As we said in *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 732, "In this respect it is a broader liability than that imposed by modern workmen's compensation statutes." Moreover, seamen may sue under the Jones Act (41 Stat. 988, 1007, 46 U. S. C. § 688) for injuries in the course of their employment. And in such actions assumption of risk is no defense. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424. Or suit may be brought in admiralty for injuries caused by unseaworthiness of the vessel or its appurtenant appliances and equipment. *Mahnich* v. *Southern Steamship Co.*, 321 U. S. — and cases cited. These are basic rights. The maritime unions appearing in the present case maintain that those remedies are indeed superior to the relief afforded by the Longshoremen's and Harbor Workers' Act. Whether they are more desirable than

a system of compensation is not for us to determine. But where Congress has provided that these basic rights shall not be withheld from a class or classes of maritime employees it is our duty on judicial review to respect the command and not permit the exemption to be narrowed whether by administrative construction or otherwise.

If a barge without motive power of its own can have a "crew" within the meaning of the Act and if a "crew" may consist of one man, we do not see why Rusin does not meet the requirements. A barge is a vessel within the meaning of the Act even when it has no motive power of its own, since it is a means of transportation on water.[4] See *The General Cass*, Fed. Cas. No. 5,307; *Seabrook* v. *Raft*, 40 Fed. 596; *In re Eastern Dredging Co.*, 138 Fed. 942; *Los Angeles* v. *United Dredging Co.*, 14 F. 2d 364; *The Robert W. Parsons*, 191 U. S. 17, 30; *Ellis* v. *United States*, 206 U. S. 246, 259. A crew is generally "equivalent to ship's company" as Mr. Justice Story said in *United States* v. *Winn*, Fed. Case No. 16,740, 28 Fed. Cas. 733, 737. But we pointed out in the *Bassett* case that the word does not have "an absolutely unvarying legal significance". 309 U. S. at p. 258. We know of no reason why a person in sole charge of a vessel on a voyage is not as much a "member of the crew" as he would be if there were two or more aboard. We said in the *Bassett* case that the term "crew" embraced those "who are naturally and primarily on board" the vessel "to aid in her navigation." *Id.*, p. 260. But navigation is not limited to "putting over the helm". It also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can "hand, reef and steer". Judge Hough pointed out in *The Buena Ventura*, 243 Fed. 797, 799, that "every one is entitled to the privilege of a seaman who, like seamen, at all times contributes to the labors about the operation and welfare of the ship when she is upon a voyage." And see *The Minna*, 11 Fed. 759; *Disbrow* v. *Walsh Bros.*, 36 Fed. 607, 608 (bargeman). We think that "crew" must have at least as broad a meaning under the Act.[5] For it is plain from the amendment exempting a "master

[4] "Vessel" is defined in Rev. Stat. § 3, 1 U. S. C. § 3, to include "every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."

[5] "Seaman" as used in a particular context may of course have a broader meaning than "crew". International Stevedoring Co. v. Haverty, 272 U. S. 50. And see Carumbo v. Cape Code S.S. Co., 123 F. 2d 991.

or member of a crew" that ship's company was not brought under the Act. And we are told by the Senate Report, as already noted, that the purpose of the legislation was to provide compensation for those who "are mainly employed in loading, unloading, refitting, and repairing ships." S. Rep. No. 973, *supra.*

Rusin, unlike the employee in the *Bassett* case,[6] did no work of the latter variety. He performed on the barge functions of the same quality as those performed in the maintenance and operation of many vessels. His were indeed different from the functions of any other "crew" only as they were made so by the nature of the vessel and its navigational requirements. The contract under which he was employed stated that the compensation was "based upon all services and time required to safeguard and operate the barge fleet." The services rendered conformed to that standard and no other. Rusin moreover had that permanent attachment to the vessel which commonly characterizes a crew. See *A. L. Mechling Barge Line* v. *Bassett*, 119 F. 2d 995.

We conclude that only by a distorted definition of the word "crew" as used in the Act could Rusin be restricted to the remedy which it affords and excluded from recovery under the Jones Act or be denied relief in admiralty. See *Maryland Casualty Co.* v. *Lawson*, 94 F. 2d 190; *Loverich* v. *Warner Co.*, 118 F. 2d 690; *Cantey* v. *McLain Line, Inc.*, 32 F. Supp. 1023, 114 F. 2d 1017, which we reversed in 312 U. S. 667.

Affirmed.

Mr. Justice ROBERTS concurs in the result.

[6] And see Moore Dry Dock Co. v. Pillsbury, 100 F. 2d 245; Henderson v. Jones, 110 F. 2d 952.